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Supreme Court of the United States.

CENTRAL STOCK YARDS COMPANY, - - - Appellant,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

BRIEF FOR APPELLEE.

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CENTRAL STOCK YARDS COMPANY, ... *Appellant*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee*.

BRIEF FOR APPELLEE.

More than twenty years ago the Louisville & Nashville Railroad Company, which then brought, as it now does, a very large amount of live stock to the city of Louisville, found it necessary to establish a live stock depot in order that the stock might be properly attended to when it reached its destination. Live stock can not be turned loose like passengers, nor wheeled away and piled up on top of each other like dead freight. They have to be fed and watered and cared for in a manner consistent with their necessities and appropriate to their preservation. Therefore railroad companies handling a large amount of live stock into a place like the city of Louisville have found it essential to establish live stock depots just as they establish passenger depots and freight depots.

In 1880 the Louisville & Nashville Railroad Company entered into a contract with the Bourbon Stock Yards Company by which it was mutually agreed that the Bourbon

Stock Yards should be the live stock depot of the Louisville & Nashville Railroad Company for the city of Louisville; that the Railroad Company would receive and deliver live stock at that place only; that it would not establish any other live stock depot and would not aid in or facilitate the establishment of any other; and in which it was also agreed that the Bourbon Stock Yards Company should at all times furnish ample facilities for the prompt and proper handling of live stock, and should at all times have on hand an ample force of men skilled in this particular line of business, who could and would give that attention to the live stock which its necessities demand. Careful provision was also made that all charges by the Bourbon Stock Yards Company, in case owners of stock should choose to leave it with the Stock Yards Company, should be reasonable. For the loading and unloading of stock upon and from the railroad cars the Louisville & Nashville Railroad Company was to pay the Bourbon Stock Yards Company; but no charge at all has ever been made for this service against the shipper or owner of the stock. It is unloaded from the cars, and kept at the Stock Yards for a reasonable length of time to give the owner a chance to take it away, without any charge whatever against him. And, on the other hand, it is received at the Stock Yards and loaded onto the cars without any charge against the owner or shipper.

This contract as made in 1880 has been continued substantially in the same form to the present date. It was renewed in 1888 and again in 1898. A copy of it will be found in the printed record, beginning at page 17. On the faith of this contract both the Louisville & Nashville Railroad Company and the Bourbon Stock Yards Company have expended a large amount of money in providing facilities for the proper handling of live stock at this depot; and both

parties have faithfully kept the agreement between them since the day it was made. The Bourbon Stock Yards Company has provided the amplest facilities for the handling of all live stock that comes to the Louisville market, and has at all times kept on hand a sufficient force of skilled men to give the stock that attention which it requires. On the other hand, the Louisville & Nashville Railroad Company has steadfastly and consistently refused to receive or deliver live stock for the Louisville market at any other place than this depot which it established at the Bourbon Stock Yards. Around this depot, that is to say in its vicinity, have grown up large packing establishments, where large quantities of live stock are butchered and packed; and although it would have been a convenience for these establishments to have special deliveries of live stock on their own side tracks connecting with the line of the L. & N., yet the Railroad Company has steadfastly refused to make any such special deliveries to any one, but has uniformly and continuously delivered only at its live stock depot at the Bourbon Stock Yards.

As to the foregoing statement of facts, there is no controversy in the record. The statement in the affidavit of Mr. Walker D. Hines (Rec. p. 14) as to the nature of the facilities and the manner of handling live stock at this depot, showing that the facilities are ample for the handling of all live stock which comes to the Louisville market, and that the manner of handling the same has been skillful and proper, is not controverted by any one. Likewise his statement (Rec. p. 13) that the Louisville & Nashville Railroad Company has always steadfastly refused to receive or deliver live stock for the Louisville market at any other place than its said live stock depot is not only uncontroverted, but is corroborated by the statement of appellant's

superintendent, Mr. Byrne, who states the same thing in effect, and says that no butcher or packer purchasing stock coming to the city of Louisville can get a delivery from the Louisville & Nashville Railroad Company at any other place than at the Bourbon Stock Yards. (Rec., p. 31.)

The establishment and maintenance of this live stock depot by the Louisville & Nashville Railroad Company has been mutually beneficial both to the public and to the Railroad Company. The public have been well and promptly served; and, on the other hand, the existence of this ample and convenient live stock depot on the line of the Louisville & Nashville Railroad Company has attracted this class of traffic to the Company. Moreover, when live stock is brought to the Louisville market and sold at the Bourbon Stock Yards, a great deal of it is bought for persons in other markets, and is thereafter shipped east; and being right on the line of the Louisville & Nashville Railroad Company, a large part of it which is thus shipped east goes over the line of the Louisville & Nashville Railroad Company from Louisville to Cincinnati, where further eastern connections are made.

Within the last year a corporation styled the Central Stock Yards Company has established a stock yards and located the same on the line of the Southern Railway, and has made a contract with the Southern Railway under which the Central Stock Yards are created *the live stock depot for Louisville of the Southern Railway.* Since the establishment of these stock yards the Louisville & Nashville Railroad Company has simply pursued *exactly the same course as to live stock which it brings to the city of Louisville that it has been pursuing for twenty years past. It has insisted upon delivering such live stock only at its live stock depot at the Bourbon Stock Yards.* And the purpose of this present

suit is to secure an injunction prohibiting the Louisville & Nashville Railroad Company from delivering live stock thus brought by it to the city at its *own live stock depot*, whenever the shipper prefers that it should go to *the depot of the Southern Railway*, and requiring the Louisville & Nashville Railroad Company to deliver its cars containing such live stock to the Southern Railway at a point in the city where it has a physical connection with the Southern Railway, so that the Southern Railway may take these L. & N. cars of live stock *to the Southern Railway depot at the Central Stock Yards.*

In order that the court may more clearly understand the local situation, we insert a diagram, not prepared by a skilled draughtsman, but by ourselves, and which is not precisely accurate, but which shows approximately the situation. The lines of the Louisville & Nashville Railroad on that diagram are indicated in red, and the lines of the Southern Railway are indicated in black. The Bourbon Stock Yards, which constitute the live stock depot of the Louisville & Nashville Railroad Company, are likewise indicated in red, and the Central Stock Yards, which constitute the live stock depot of the Southern Railway, are indicated in black.

The Louisville & Nashville Railroad Company enters the city of Louisville both from the south and from the east. These two lines originally belonged to different corporations and terminated at different depots in the city. They have, however, both come into the ownership of the Louisville & Nashville Railroad Company, and are now connected by a line appearing on the accompanying diagram running in a northeast and southwest direction, connecting the east-bound line with the south-bound line.

The major part of the live stock coming to the city of Louisville over the Louisville & Nashville Railroad Com-

pany's line comes from the south. It first reaches the yards of the Louisville & Nashville Railroad Company at South Louisville, indicated at the point A on the diagram. From these yards at South Louisville the live stock cars are taken direct in a northeasterly direction to the live stock depot at the Bourbon Stock Yards, where they are unloaded. If the live stock comes from the east, of course it is taken direct to the Bourbon Stock Yards without coming to South Louisville. The line of the Louisville & Nashville Railroad coming from the south continues in the same line northwardly through South Louisville to the main depot on Broadway, about three miles north of South Louisville. Between Broadway, which is the northern terminus of the line, and Kentucky Street, which is several blocks south of Broadway, the Louisville & Nashville Railroad has very extensive distributing yards, to wit, yards where cars are shifted around and from which special deliveries of dead freight to different sidings of adjacent industries are made. In this connection we should explain that the point referred to in the record and on the diagram as South Louisville is in the city of Louisville, but is referred to as South Louisville merely for convenience, because it is in the extreme southern portion of the city, just as the territory about the Bourbon Stock Yards is referred to as East Louisville, because it is in the extreme eastern portion of the city.

From the foregoing explanation it will be seen that all live stock destined for the Louisville market, when arriving from the south, is carried to the Bourbon Stock Yards over the connecting track which runs from South Louisville in a northeasterly course to the Bourbon Stock Yards at East Louisville. The tracks from South Louisville, northwardly toward Kentucky Street and Broadway, are greatly crowded with traffic. The record shows there is so much traffic from

South Louisville to the Kentucky Street yards that, as to dead freight which may be destined for intermediate points between South Louisville and Kentucky Street, the switch engine which takes cars at South Louisville does not stop to make any special deliveries between South Louisville and Kentucky Street, but takes all of the cars straight through to the Kentucky Street yards; and it is afterwards distributed from those yards by another switch engine. (See the affidavit of Mr. Hines, Rec., p. 17.)

The Southern Railway enters the city of Louisville, as shown by the accompanying diagram, in the southeastern part of the city and pursues an extremely circuitous route, running west through the southern portion of the city, then north through the western portion of the city, and finally east through the northern portion of the city, reaching its depot at Seventh Street in the city of Louisville, near the Ohio River. The result of this very circuitous route is that although the Central Stock Yards are situated just a few yards east of the boundary line of the city of Louisville, to wit, at or about the point G on the accompanying diagram, they are nine miles from the depot of the Southern Railway at Seventh and the river. We make this explanation at this point because there is a feeble effort in the record to claim that the Central Stock Yards is *not a Louisville point*, but should be treated as any other station or town on the line of the Southern Railway, such as Versailles, Shelbyville, Lexington, etc., and reference is made to the fact that it is nine miles from Louisville. The meaning of this is that it is nine miles from the Southern Railway depot in Louisville on account of the extremely circuitous route of that railway through the city. But, as heretofore said, it is in fact only a few yards outside of the city limits. And the contract between the Southern Railway and the Central

Stock Yards Company shows that these Stock Yards are made *the Louisville live stock depot of the Southern Railway*. (Rec., pp. 41, 42.)

In the record it is said that there are three points of physical connection between the Southern Railway and the Louisville & Nashville Railroad at which cars can be exchanged between the two lines.

(1.) One is referred to in the record as the Bergen & Meehan switch. This is at the point F on the diagram, where the L. & N. track, running from South Louisville to East Louisville, crosses the Southern Railway. But it is shown by the uncontradicted statement of Mr. Hines that this is in fact not a connection between the two lines. This siding, which makes a physical connection with the Southern Railway and also with the Louisville & Nashville Railroad, is a mere private siding which belongs to Bergen & Meehan, and which is not open to general use either by the Louisville & Nashville Railroad or the Southern Railway. (Rec., p. 15.)

(2.) Another point of physical connection is referred to in the record as the Fourth Street crossing. This is the point B on the diagram. But as to this crossing, Mr. Hines explains, and his explanation is not denied, that it would be not only impracticable but dangerous to attempt to exchange traffic at this place. There are no side tracks here, other than the short curved track which makes the connection between the two lines. In other words, there is no track at this point upon which cars could be set off by one company to be taken up by the other. The main lines of the Louisville & Nashville Railroad Company and the Southern Railway cross each other at this point, over which the passenger trains of the two companies pass. Furthermore, the Southern Railway at this place has

only a single track. The result would be that if the Louisville & Nashville Railroad Company should attempt to deliver live stock to the Southern Railway at this point, it would have to set these live stock cars out on the main single track of the Southern Railway, where they would be in the way of all the regular trains, both freight and passenger, coming to or going from the city of Louisville. And the same would be true if the Southern Railway should attempt to deliver cars to the Louisville & Nashville Railroad Company. The only way in which exchanges could be made at this point would be for the respective engines of the respective lines to meet at this point of connection in order that the cars dropped by one engine should be immediately taken up by the cars of the other engine and carried away. See affidavit of Mr. Hines, p. 15.

(3.) The third point of connection is what is known as the Seventh and Magnolia Avenue connection, and is shown on the diagram at the point C. There is a line which runs off from the main line of the Southern Railway at the point E in Magnolia Avenue, and runs eastwardly along Magnolia Avenue to a connection with the Louisville & Nashville Railroad at the point C. This line from E to C is said to belong to the Southern Railway. At the point C it makes connection with the Louisville & Nashville Railroad by a southwardly curve.

The purpose of this suit, as heretofore said, is to enjoin the Louisville & Nashville Railroad Company, when bringing live stock to the city of Louisville, from delivering the same at its live stock depot at the Bourbon Stock Yards, and to require that the Louisville & Nashville Railroad Company shall, whenever the shipper so desires, deliver such stock to the Southern Railway for delivery at the Central Stock Yards.

If this live stock comes into the city of Louisville from the east over the Louisville & Nashville Railroad Company's tracks, it would, according to the usual course of business, be delivered immediately to the Bourbon Stock Yards; but if the company is required, at the demand of the shipper, to deliver this stock to the Southern Railway for the Central Stock Yards, it would have to be taken from East Louisville in a southwesterly direction to South Louisville at the point A, and then taken from South Louisville northwardly over the Louisville & Nashville's main tracks to the point C, at Magnolia Avenue, and there delivered to the Southern Railway, which would then carry the stock westwardly along Magnolia Avenue from the point C to the point E, where it would make connection with the main line of the Southern Railway, and from which point it would be carried in a southeasterly direction by the Southern Railway to the Central Stock Yards at the point G.

On the other hand, if the live stock should come from the south it would first reach Louisville at the point A in South Louisville. At this point, according to the regular course of handling the business, all the live stock cars would be taken by one engine from the point A in a northeasterly direction to the Bourbon Stock Yards at point H. But if required to deliver to the Southern Railway for delivery at the Central Stock Yards, then the live stock cars destined for the Central Stock Yards would at South Louisville have to be separated from the cars destined for the Bourbon Stock Yards; then those destined for the Bourbon Stock Yards would be carried by one engine, as heretofore indicated, to those yards, while those destined for the Central Stock Yards would be carried by another engine over the main tracks of the Louisville & Nashville, running from A northwardly to the Magnolia Avenue connection with the Southern Rail-

way at the point C; thence westwardly by a Southern Railway engine over the Southern Railway along Magnolia Avenue to the point E; thence southeastwardly over the Southern Railway to the Central Stock Yards at the point G. Such is the most direct course which could be taken for live stock destined for the Central Stock Yards. But as a practical matter, as heretofore explained, the switch engines which carry freight from South Louisville northwardly over the main tracks of the Louisville & Nashville Railroad Company do not make any stops between South Louisville and the distributing yards at Kentucky Street, which is about a mile north of Magnolia Avenue; and from the Kentucky Street yards cars are distributed by another switch engine: so that practically the way these live stock cars would be handled, if delivered to the Southern Railway, would be to carry them from South Louisville at the point A to the Kentucky Street yards at the point D, where they would then be taken by another switch engine and brought back southwardly from the point D to the point C at Magnolia Avenue, where they would be delivered to the Southern Railway, and thence pursue the course heretofore indicated.

The distance from South Louisville (point A) to the Bourbon Stock Yards (point H) is 3.94 miles. The distance from South Louisville (point A) to the Central Stock Yards via the L. & N. to Magnolia Avenue, thence via Southern Railway to Central Stock Yards, is 3.81 miles (the distance from South Louisville to Seventh and Magnolia Avenue connection being 1.71 miles, and the distance from the Seventh and Magnolia Avenue connection to the Central Stock Yards, passing through the point E, being 2.1 miles). See affidavit of Hines, Rec. 54.

We have made the foregoing explanation of the local situation because we thought the court would be thereby assisted

in understanding the record. But, after all, the case is narrowed down to the simple question of whether the Louisville & Nashville Railroad Company, in bringing live stock to the city of Louisville can insist on delivering the same only at *its live stock depot in that city*, or whether it can be compelled at the demand of the shipper to refrain from delivering the live stock at its own depot and can be required to turn the cars containing the same over to the Southern Railway at a distant point in the city, where there happens to be a physical connection between the two tracks, to be thence delivered to *the depot of the Southern Railway*.

The suit is brought by the Central Stock Yards Company as sole plaintiff. This company acts as the agent of the Southern Railway for loading and unloading live stock brought to its yards; and also furnishes pens and other accommodations for such live stock, as a hotel-keeper furnishes accommodations for human beings, and as a livery stable keeper furnishes accommodations for horses and mules. As a result of this situation buyers and sellers of stock come to such a place to buy and sell. The Central Stock Yards Company is itself not the owner of any stock. It has never offered to ship any stock over the Louisville & Nashville Railroad. It has never been either the consignor or consignee of any stock. Its complaint is that, if live stock should be brought to its yards, it would get the compensation of fifty cents a car from the Southern Railway for unloading it; and, if kept at its yards by the owner or consignee, it would get a chance to feed the stock, so long as kept there, and would make a profit out of the feed, and also out of the charge for keeping; but that the Louisville & Nashville Railroad Company, by its refusal to deliver live stock to the South-

ern Railway for delivery at the Central Stock Yards, cuts the Central Stock Yards out of this character of profit. Therefore it insists that it has a right to an injunction against the Louisville & Nashville Railroad Company to compel the Company to do what complainant says the shippers and owners of live stock want the Company to do, and which if done would result indirectly in the benefit to the complainant above explained, just as delivering passengers near a hotel would result probably in increased business to that hotel, whereas a delivery of passengers two or three miles away from the hotel would take from it a large part of such business. One of the questions arising in this case is as to whether or not the Central Stock Yards Company, which keeps a hotel for live stock, can enjoin a railroad company from disobeying and disregarding what the hotel-keeper says are the wishes and desires of the owners and shippers of the stock.

The case having been heard in the lower court on a motion for a preliminary injunction, that court reached the conclusion that it did not have jurisdiction of the case, because it was of opinion that the complainant certainly did not have a right at common law to the relief prayed for, and that if it had any right at all in the matter it was under the Interstate Commerce Act, as *a new right created by that act;* but that, as that act expressly provided remedies for a violation of its provisions, to wit, either a suit for damages or an application for relief to the Interstate Commerce Commission, therefore the remedies thus provided by the act for the violation of a right created by the act, were exclusive; and that the complainant could not maintain this suit in equity, and was therefore not entitled to the injunction asked for. The court was also of the opinion that even if this jurisdictional question should be passed, the right to relief upon the merits was

so uncertain that it should not be determined on a motion for a preliminary injunction, but should wait for final hearing. Accordingly the court overruled the motion for a preliminary injunction. (The opinion is found in this record beginning at page 59, and is reported in 112 Fed. Rep. 823).

Subsequent, however, to the delivery of this opinion a final decree was entered dismissing the bill on the ground of want of jurisdiction, and without prejudice to complainant's right to pursue other remedies it might have upon the matters alleged by it. And from that decree of dismissal an appeal was taken to the Circuit Court of Appeals.

In the Circuit Court of Appeals the first question was, of course, that of jurisdiction; but it was evident that even if the court should conclude that it had jurisdiction, yet if it should further conclude that the decree dismissing the bill was right on any other ground, either because the complainant has no legal interest in the controversy which will justify the maintenance of the suit, or because the position of the defendant is correct as to its rights and duties in the premises, the court would not reverse the decree, but would affirm it. It is true, the case in the Circuit Court had only been prepared on the motion for a preliminary injunction, but it had been very fully prepared on this motion, and, as this court has held in the case of Smith vs. Vulcan Iron Works, 165 U. S. 518, that on an appeal to the Circuit Court of Appeals from an order granting a preliminary injunction the Circuit Court of Appeals might consider and decide the merits of the case and order a dismissal of the bill, it would seem necessarily to follow that on an appeal from a decree dismissing the bill, even though the case had been prepared only on a motion for a preliminary injunction, the Circuit Court of Appeals, if it thought the bill had been properly dismissed on the merits of the case, could so hold and therefore affirm the decree.

This view of the law was adopted by both sides in the Circuit Court of Appeals, and the case accordingly was briefed elaborately on the merits, and on the right of complainant to sue, as well as upon the question of jurisdiction.

The Circuit Court of Appeals decided the case upon the merits, holding, in an opinion by Judge Day, now Mr. Justice Day, that the complainant was not entitled to the relief sought, and therefore affirmed the decree of the Circuit Court dismissing the bill. The opinion of the Circuit Court of Appeals will be found in this record beginning at page 70, and is reported in 118 Fed. 113.

From the decree of affirmance by the Circuit Court of Appeals an appeal has been taken to this court.

I.

JURISDICTION.

The exact proposition which the Circuit Court decided, on the question of jurisdiction was that the right asserted by complainant did not exist at common law; that if it existed at all (upon which the court expressed no decided opinion) it was a right created by the Interstate Commerce Act; and that as the Interstate Commerce Act itself provides remedies for the enforcement of its provisions, including the enforcement of any rights newly created by it, therefore these remedies thus provided by the act itself are exclusive; and as the remedies thus provided by the act, so far as they relate to complaints by individuals, are either an action at common law for damages or a complaint before the Interstate Commerce Commission, therefore complainant has no right to maintain a suit in equity for an injunction to restrain the violation of the rights asserted in its bill of complaint herein,

which rights, as above said, are rights not existing at common law but existing, if at all, solely by virtue of the provisions of the Interstate Commerce Act.

As to whether or not the rights insisted upon by complainant are of a character which did exist at common law, we will not stop now to consider at length, but will consider more elaborately in a later part of the brief, where we shall consider the entire question of the nature of the rights claimed, both upon common law principles and under the provisions of the Interstate Commerce Act. But, assuming now for the purpose of argument that the rights thus insisted upon by complainant did not exist at common law, and that if they exist at all it is only by virtue of the Interstate Commerce Act, we submit the following considerations in support of the conclusion of the Circuit Court.

It has long been a recognized principle of statutory construction that where a statute gives a new remedy for a pre-existing right, the new remedy will not be considered to be exclusive of pre-existing remedies, but only as cumulative thereto; but that when a statute creates a new right, and at the same time specifies a particular remedy for the vindication of that right, this remedy will be considered to be exclusive of all others, unless words are expressly used to the contrary. Furthermore, it may sometimes be true that a statute is in part merely declaratory of the common law, thus merely recognizing pre-existing rights, but is also in part creative in character, giving rise to new rights which did not previously exist. And in such a case the common law remedies will be applicable for the enforcement of the pre-existing common law rights, although a remedy be pointed out in the statute; but for the new right created for the first time by the statute, the remedy pointed out by the statute will be accepted as the exclusive remedy for the vindication of the same.

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In Stafford vs. Ingersoll, 3 Hill, 39, the court said :

"When a statute merely gives a new remedy, without "any negative expressed or implied, the old remedy is "not taken away, and the party may have his election "between the two. (Citing authorities) . . . So where a "statute *creates* a right which did not exist before, and "prescribes the remedy for a violation of it, *that remedy* "*must be pursued.* Almy vs. Harris, 5 Johnson, 175. "But the statute under consideration does little more than "declare that the injured party may in certain cases have "his damages appraised by the fence viewers; and I am "not aware of any rule of interpretation upon which this "can be made to take away the remedy that before "existed at the common law.

"It may be that the statute has *in some cases* given a "remedy against the owner of the adjoining close *where* "*none existed at the common law. In cases of that* "*description the statute remedy must be pursued.* But "where there was an action at the common law, that "remedy still exists." (Our italics.)

The case just cited was expressly approved by this Court in the case of Farmers, etc., National Bank vs. Dearing, 91 U. S. 35, where the court said :

"Where a statute creates a new offense and denounces "the penalty, or gives a new right and declares the "remedy, the punishment or the remedy can be only that "which the statute prescribes. Stafford vs. Ingersoll, 3 "Hill, 38; First National Bank of Whitehall vs. Lamb, "57 Barb. 429."

To the same effect see Fourth National Bank vs. Francklyn, 120 U. S. 747, and Barnett vs. National Bank, 98 U. S. 555, 558.

These authorities seem to us sufficient to conclude the question as to the proposition of law here announced. It was suggested in argument in the lower court that the statutory remedies thus pointed out will be taken as exclusive only when they are adequate, leaving to the court to determine whether or not they are adequate. This seems to us a misconception of the rule. The rule is one of statutory construction. In other words, the court considers that the Legislature, when creating a new right, and pointing out a specific remedy for its vindication, has determined, as a matter of legislative determination, that the remedy thus pointed out *is adequate* and is to be the exclusive remedy for the vindication of the newly created right. To leave the court in every instance to determine for itself whether or not the remedy provided by the statute is adequate, and to leave a court of equity to supply other remedies if it thinks those given by the statute are inadequate, would practically abolish the rule, and would leave the court of equity full power to give remedies according to the principles upon which it acts when not controlled at all by statute, to wit, the principle of providing a remedy whenever in its judgment the common law remedies are not adequate.

Counsel for appellant strongly rely on Section 22 of the Interstate Commerce Act, which contains the following language:

"Nothing in this act contained shall in any way "abridge or alter the remedies now existing at common "law or by statute, but the provisions of this act are in "addition to such remedies." (1 Sup. to U. S. Rev. Stats., p. 691.)

But in construing this language it must be remembered that unquestionably the Interstate Commerce Act is largely declaratory of the common law. Thus many contracts and actions on the part of common carriers making unjust or unreasonable discriminations, or charging unjust or unreasonable rates for service, were unlawful at the common law. The invalidity of such contracts or of such actions is recognized and denounced by the Interstate Commerce Act. There were, at the passage of the Interstate Commerce Act, remedies "existing at common law or by statute" for the vindication of rights violated by such contracts or actions as above indicated. And while the Interstate Commerce Act does expressly point out remedies which may be used in vindication of such rights, yet the statutory remedies thus indicated are not exclusive of the previously existing statutory or common law remedies; and we submit that it is to such cases that the language of the act above quoted refers. It would hardly seem appropriate to refer to *remedies previously existing*, either at common law or by statute, for *rights* which did *not* previously exist, and which are created for the first time by the Interstate Commerce Act itself. Inasmuch as the Interstate Commerce Act does simply declare the previously existing law as to some rights, and does create for the first time other rights, and does provide that the remedies pointed out by it shall not be deemed exclusive of remedies then existing, the reasonable inference is that as to those rights which previously existed, the remedies previously existing, as well as those pointed out by the act, should continue; but that the language above quoted, referring to pre-existing remedies, should not be applied to rights which did not previously exist, but were created for the first time by the act itself.

We think we can truly say that the question here discussed is an open question so far as any special consideration

and determination of it have heretofore been had. The most that can be said on the side of complainant is that some cases have been decided in which the question *might have been* raised and decided, but in which it was not raised or decided. It is true that in the case of Little Rock R. Co. vs. East Tennessee, etc., R. Co., 47 Fed. 774, decided by Judge Hammond, he expressed the opinion that the remedies granted by the Interstate Commerce Act are not exclusive; but he also says in his opinion that it is not necessary to decide that question. He furthermore says that Judge Jackson had previously decided the question in the same way as indicated by himself in K. & I. Bridge Co. vs. L. & N. R. Co., 37 Fed. 567. But a remarkable thing about this matter is that when we examine the case just cited, and which Judge Jackson decided, we find that the procedure adopted in that case was precisely the procedure which the Circuit Court in the case at bar held ought to have been adopted, to wit, an application first to the Interstate Commerce Commission, and then an application to the court to enforce the order of the Commission.

It is next insisted that the late act of Congress, approved February 25, 1903, known as the Elkins Act (Supplement of 1903 to U. S. Compiled Statutes, page 363), gives the Circuit Court jurisdiction in the first instance of a case of this kind, without the necessity of a preceding application to the Interstate Commerce Commission, even if such jurisdiction did not previously exist; and that the decision of this court in Missouri Pacific Railroad Co. vs. United States, 189 U. S. 274 shows that this can be taken advantage of in the case at bar.

We can not see anything in the Elkins Act that gives the jurisdiction insisted upon, if it did not previously exist. The *first section* of that act relates wholly to the matter of crimi-

nal prosecution. The *second section* bears simply upon the question of parties, and provides that in any proceeding for the enforcement of the provisions of the statutes relating to Interstate Commerce, all persons interested in or affected by the orders or decrees sought, may be made parties to the proceeding. The *third section* of the act relates solely to proceedings or investigations instituted either by the Interstate Commerce Commision or by the Attorney General of the United States. The *fourth section* of the act simply repeals all acts and parts of acts in conflict with it, and provides that such repeal shall not affect pending suits, but that such causes shall be prosecuted to a conclusion and such rights enforced in a manner "heretofore provided by law and as modified by the provisions of this act." The *fifth section*, which is the last, simply provides that the act shall take effect from its passage. We repeat, therefore, that, if prior to the adoption of the Elkins Act the jurisdiction in equity of the Circuit Court, under such a state of case as is now presented, did not exist, we can see nothing in the Elkins Act which creates it.

As to the opinion of this court in Missouri Pacific R. Co. vs. United States, *supra*, it seems to us to be an authority against the appellant rather than in its favor. That was a suit instituted by the United States against the Missouri Pacific Railway for an alleged discrimination contrary to the provisions of the Interstate Commerce Act, and without any previous investigation or determination by the Interstate Commerce Commission. It was insisted in the Circuit Court by the defendant that the remedies provided by the Interstate Commerce Act were exclusive of all others, and that the act did not authorize the United States to bring such a suit in equity without previous action by the Interstate Commerce Commission. The Circuit Court held that the

United States had a right to maintain the suit; and therefore took jurisdiction and decided the case upon its merits. This court held that the judgment of the Circuit Court was erroneous; and that the United States was not authorized, as the law existed at the time the degree was entered, to maintain such a suit. This necessitated a reversal of the decree; and it was reversed; but inasmuch as the decree had to be reversed, and inasmuch as the Elkins Act expressly conferred the power to maintain such a suit as the one there under consideration, therefore the court held that the case should be remanded with directions to take such further proceedings as should be consistent with that act.

Thus it will be observed that in that case this court held that the decree of the Circuit Court was erroneous *at the time it was rendered*; and therefore it was reversed; and the action being thus reinstated in the Circuit Court, the court held that further proceedings should be in accordance with the Elkins Act, inasmuch as it expressly provided that it should apply to pending proceedings. But in the case at bar appellant asks the court to do a very different thing. It asks the court, even it it should conclude that the decree of the Circuit Court was *correct when it was rendered*, under the law as then existing, still to reverse that decree, because, as complainant insists, the law has since been changed. This we are sure the court could not do, if the law had been changed; though, as said above, we are sure it has not been changed so as to cover such a case as is presented in the present record.

So far as the opinion under consideration has any bearing upon the case at bar it seems to us to be decidedly in favor of the appellee, for it holds that, as the right to maintain the suit therein sought to be maintained was not given by the Interstate Commerce Act, therefore the suit could not be

maintained. And, while it held that that particular right, to wit, the right of the United States to sue in equity, was given by the Elkins Act, yet it did not intimate, and it is not true, that the Elkins Act gives to an individual the right to maintain such a suit as the appellant seeks to maintain in the case at bar.

In the case of acts claimed to be in violation of the Sherman Anti-Trust Act of July, 1890 (1 Sup. to U. S. Revised Statutes, p. 762), it has been expressly decided in a number of cases, without dissent so far as we know, that the remedies pointed out by that statute are exclusive of all others; and therefore that, however much an individual may be damaged by the monopolies, etc., prohibited by that statute, he has no right to the remedy by injunction, but can only proceed at law for damages. It is very difficult to understand why the remedies pointed out by that statute should be deemed exclusive, and those pointed out by the Interstate Commerce Statute should not be so deemed as to rights created by the latter statute. For cases holding the remedies created by the Sherman Anti-Trust Act to be exclusive see Pidcock vs. Harrington, 64 Fed. 821; Gulf, etc., R. Co. vs. Miami Steamship Co. 86 Fed. 407, 420; South Indiana Express Co. vs. U. S. Express Co. 88 Fed. 659, 663.

We submit, therefore, in conclusion that if the rights asserted by complainant in this suit do not exist upon common law principles, and if is compelled to rely upon the Interstate Commerce Act for the creation of such rights, then it has no right to enforce the same by a statute in equity, until it shall first have applied to the Interstate Commerce Commission and gotten an order to the effect desired from that commission.

II.

Complainant Not the Party in Interest.

Passing beyond the question of jurisdiction, the question arises on this record as to whether or not the Central Stock Yards Company is the proper person to make complaint of the alleged violations of law by the Louisville & Nashville Railroad Company which are referred to in the bill of complaint.

The complaint is not that the Louisville & Nashville Railroad Company has violated any contract for the shipment of live stock, but it is simply that the law requires (according to the complainant's construction of it) that the Louisville & Nashville Railroad Company should receive live stock from persons who may desire to ship it, and should consent to carry the same and deliver it to the Southern Railway Company for delivery at the Central Stock Yards. It is alleged that the Louisville & Nashville Railroad Company has refused to receive any stock which persons desire to ship to the station at Central Stock Yards, Kentucky, an alleged point on the line of the Southern Railway. If so, who has been wronged thereby in any legal sense?

There is no contract of any kind between the Louisville & Nashville Railroad Company and the Central Stock Yards Company; and therefore it can not be claimed by the Central Stock Yards Company that the Louisville & Nashville Railroad Company has violated any contract obligation to it. Again, the Central Stock Yards Company is not the owner of any cattle, and has not offered to ship any cattle over the L. & N. Railroad. It therefore can not complain that its rights as a shipper have been in any sense violated. Further-

more, it is not even alleged that any owner of live stock has ever attempted to ship live stock to the Central Stock Yards Company *as a consignee.* There are many allegations about the desire and the offer of shippers to ship live stock to the Central Stock Yards as *a place of destination.* A perfectly familiar rule of pleading is that a pleading should be construed most strongly against the pleader, and whether we apply that rule of pleading or whether we simply construe the pleading reasonably, it does not amount to a complaint that the owners of live stock have endeavored to ship the same to the Central Stock Yards Company *as consignee* thereof, but only that they have desired or attempted to ship it to the Central Stock Yards *as a place of destination.*

Thus take the general charge in paragraph seven of the bill of complaint as follows:

> "Plaintiff says the Louisville & Nashville Railroad "Company has announced its intention and purpose to "refuse to receive, bill, transport, transfer, switch or "deliver any live stock—the shipment of which originates "outside of the State of Kentucky—consigned or tendered "to be consigned to any point of physical connection be- "tween the said line and the lines of the Southern Rail- "way Company in Kentucky destined to the Central "Stock Yards Station, Ky., or to the Central Stock Yards, "Kentucky, or any such live stock consigned to any "individual, partnership, firm or corporation at said "Central Stock Yards, Ky., or at said Central Stock "Yards Station, Ky., or via the Southern Railway Com- "pany in Kentucky destined to said yard or station . . . "Although during said time from day to day live stock "shipments originating out of the State of Kentucky "have been tendered defendant from connecting lines and

"other common carriers and shippers, consigned to said "Central Stock Yards, Ky., and to said Central Stock "Yards, Ky., and to individuals, firms, partnerships and "corporations at said Central Stock Yards, Ky., and at "said Central Stock Yards, Ky., and to said stock yards "and station via the Southern Railway Company in "Kentucky." (Rec. 4 and 5.)

Or again, take the one specific case charged in the bill of complaint, to wit, the case of the stock of Allen Bros. The language of the bill of complaint as to this stock is:

"That before receiving and billing said carload of "stock, said Allen Bros. demanded of the Louisville & "Nashville Railroad Company that said company receive, "bill, transport, transfer switch and deliver the said car- "load of cattle to the Southern Railway Company, at "Louisville, Kentucky, at one of the points of physical "connection between the tracks of the Southern Railway "Company and the tracks of the defendant, the Louisville "& Nashville Railroad Company, for delivery by the "Southern Railway Company *at* Central Stock Yards, "Central Stock Yards Station, Ky., care of Hart, McCamp- "bell & Company; but the defendant, the Louisville "& Nashville Railroad Company, neglected, failed and "refused to so bill the said stock and would not bill same "otherwise than as stated, that is, to the said Allen Bros., "care of Hart, McCampbell & Company in Louisville, "Ky." (Rec., p. 7.)

We repeat, therefore, that the only fair interpretation of the bill of complaint, taking it altogether, is that the Central Stock Yards Company simply complains that the Louisville

& Nashville Railroad Company will not receive stock destined to the Central Stock Yards, as a *place of destination.* If there be anywhere in the long bill of complaint an expression which might seem to indicate that some shipper has desired to ship to the Central Stock Yards Company as consignee, such expression would be governed by what is the manifest meaning of the bill of complaint as a whole. Thus in the case of Prescott, etc., R. Co. vs. Atchison, etc., R. Co., 73 Fed. Rep. 439, the court said:

> "Now, it is true that the complaint contains a single "clause, at the close of the sixty-ninth paragraph, which "uses the words 'by utterly refusing to receive or deliver "freight or passengers to or from it.' That language "taken in its full scope imports a refusal to receive "freight that had its origin on the line of the Prescott & "Arizona Central Railroad Company, wherever and "under whatever circumstances it was tendered. But it "is a fair rule of pleading that the complaint is to be "interpreted, even upon demurrer and upon motion to "dismiss, as a whole."

And accordingly the court held that although this general allegation did occur at one point in the bill, yet it was manifest that the real complaint was the refusal to interchange freight and passengers on through bills and through tickets, and not the absolute refusal to receive or deliver freight or passengers under any circumstances.

In other words, examining the entire situation, we find that the Central Stock Yards Company is simply a corporation, organized for profit, which proposes to keep a place of accommodation for live stock, where people can send their stock for safe-keeping, and where the same can be bought

and sold by persons desiring to deal in live stock. And therefore the Central Stock Yards Company, although not itself the owner of any live stock, and neither the consignor nor the consignee of any shipment of live stock, and without having any contract with the Louisville & Nashville Railroad Company on the subject of transportation and delivery of live stock, simply complains that various persons desire to send live stock to the complainant's yards, and that if the defendant would comply with this request and desire of the owners of stock, the result would be that complainant would make a profit out of the keeping of such live stock.

We submit that this does not give any cause of action to the Central Stock Yards Company, any more than a hotel-keeper who might have a hotel at a certain point in a city near a railroad would have a right to complain that passengers would like to alight near his hotel, in which event they would likely come to him as guests, but that the railroad company by refusing to stop near his hotel, or to discharge passengers near his hotel, deprives him of the trade which would come to him if such stoppage or discharge should be made.

Or, to take another illustration, suppose I direct an agent of mine to go to a certain store and buy a bill of goods. Instead of the agent going, as directed by me, to the store of John Smith to buy the goods, he goes to the store of Tom Jones and buys the goods. The result is that instead of John Smith making a profit from the sale, as I expected and desired, Tom Jones makes the profit. Would this give John Smith, who has thus missed the profit, any cause of action against the agent who bought the goods at the other place, contrary to the directions of his principal? Clearly it would not, and yet John Smith has missed the profit which he would have made if my agent had obeyed my instructions, as he ought to have done.

Concede for the purpose of argument that it is the duty of the Louisville & Nashville Railroad Company to receive from the owners and shippers of live stock in Tennessee such live stock as they may desire to send to the Central Stock Yards, and concede for the sake of argument that it violates its duty as a common carrier in refusing to receive such live stock and send it by the Southern Railway to the Central Stock Yards, and concede, further, for the purpose of argument, that if the company would perform its duty and send the stock to the Central Stock Yards, the owner of the Central Stock Yards would make a profit from the keeping of such stock; and yet we submit that this does not establish any duty on the part of the Louisville & Nashville Railroad Company *to the Central Stock Yards Company*, as the owner of this live stock hotel, the breach of which will give a cause of action to the Central Stock Yards Company.

Counsel refer to certain stock yards cases where they say that relief was either granted or refused to the stock yards company, but without this particular point being considered as an obstacle to the relief prayed.

One of these cases is Covington Stock Yards Co. vs. Keith, 139 U. S. 128, to which we will hereafter refer more at length, where the court gave certain relief to Keith as the owner of certain stock yards. But an examination of the statement of facts in the opinion of Mr. Justice Harlan in that case shows that Keith was *himself engaged in buying and selling live stock*, not only as commission merchant but on his own account. So that he was not simply the owner of a stock yards which desired to keep live stock for the profit there was in keeping them for others; and he stated in his bill that he "was provided with all the necessary means of receiving, feeding and caring *for such stock as he pur-*

chased, or as might be consigned to him by others for sale," but that the railroad company would not deliver the stock to him. (Page 129.)

Another case relied on by appellant is Interstate Stock Yards Co. vs. Indianapolis Union Railroad Co, 99 Fed. Rep. 472. But the gist of the complaint and the prayer in that case is shown in the following sentence from the opinion of Judge Baker, to wit:

> "It (complainant) simply asks that live stock consigned "to it, or to persons doing business in its yards, or con- "tracted in the bill of lading to be unloaded, fed, watered "and rested there, should be *delivered in accordance with* "*the contract.*" (Page 483.)

There is no allegation anywhere in the bill of complaint in the case at bar that the Louisville & Nashville Railroad Company has failed or refused to deliver to the Central Stock Yards any live stock which it has contracted to deliver there.

The other case referred to is Butchers, &c., Stock Yards Co. vs. L. & N. R. Co., 67 Fed. Rep. 35, a case in which the complaint of the Butchers & Drovers Stock Yards Company, in a case almost exactly like the case at bar, was dismissed on its merits. It is true that it was not dismissed on the ground we are now considering, and no mention was made of such a ground. But the statement of the case in the opinion does not enable us to tell what was the showing of the Stock Yards Company as to the nature of its interest in the controversy, or as the foundation for its right to complain of the failure of the Louisville & Nashville Railroad Company to deliver stock at its stock yards. The most that can be said of this case is that if the point which we are now considering could have been raised in the case, it was not thus raised.

We submit, therefore, that the Central Stock Yards Company has exhibited no right to maintain this complaint on account of the refusal of the Louisville & Nashville Railroad Company to receive stock destined for the Central Stock Yards, whether any one else would have the right to make the complaint or not.

III.

Delivery At Destination.

Passing now beyond the question of jurisdiction, and beyond the question as to whether the Central Stockyard's Company has shown itself to have any legal interest in the controversy, and supposing both those propositions to have been decided in favor of appellant, we come to the real merits of the case, to consider whether or not it is shown that the Louisville & Nashville Railroad Company has violated any right of anybody.

In the brief of counsel for appellant, they treat this case entirely as if it were one involving "connecting carriers," and as to the duty of one carrier to receive freight at a point on its line destined to a point on the line of a connecting carrier. In other words, the case is treated as if it involved the question, for example as to whether or not the Louisville & Nashville Railroad Company is required to receive freight at Nashville destined to some point, such as Shelbyville or Lexington, on the Southern Railway beyond Louisville, and which is routed by the shipper from Nashville to Louisville by the Louisville & Nashville Railroad Company, and then from Louisville to Shelbyville or Lexington by the Southern Railway. Accordingly counsell give extended consideration to authorities bearing upon the question of the duties of com-

mon carriers in the matter of *forwarding* freight through the instrumentality of connecting carriers.

We will at the proper place consider these arguments and authorities, made and cited by appellant; but we earnestly insist that the case at bar does not legitimately present the questions just suggested. It is really not a case involving the duty of a common carrier to forward freight beyond its line to a point of destination on the line of a connecting carrier. But it is a case which involves the duty of a common carrier in the matter of *delivery* of freight when it *has reached its destination.*

All of the argument on the subject of delivering to connecting carriers, and forwarding by connecting carriers to destination, is based on the idea that Central Stock Yards, Ky., is an altogether different place from Louisville, Ky., and that a shipment to Central Stock Yards, Ky., should be treated as if it were a shipment from Nashville to Lexington via Louisville. But our statement of the facts of this case shows that this is not the real truth of the situation. Central Stock Yards, Ky., is no more a distinct place from Louisville than Bourbon Stock Yards, Ky., is a distinct place from Louisville.

Real substantial facts can not be created by the mere use of words. And the addition of the word "station" after Central Stock Yards, or the creation of an alleged station on the line of the Southern Railway at the Central Stock Yards, can not alter the substantial fact that Central Stock Yards are simply stock yards designed to accommodate the Louisville market for live stock, precisely as in the case of the Bourbon Stock Yards; and that the Central Stock Yards are simply the live stock depot of the *Southern Railway for the city of Louisville*, precisely as the Bourbon Stock Yards are the live stock depot of the *Louisville & Nashville Railroad*

Company for the city of Louisville. The contract between the Central Stock Yards Company and the Southern Railway Company, introduced in evidence by the complainant, distinctly shows by the fourth section thereof that these stock yards are made the live stock depot of the Southern Railway for the city of Louisville (Rec., pp. 41 and 42), and Mr. Powell so states in his affidavit (Rec. 25.) And the fact that it may be situated a few feet or yards outside of the city boundary, so as to avoid the payment of city taxes, can not alter the real situation. A delivery of live stock to the Central Stock Yards is in every legitimate sense (if substance be regarded rather than form) *a Louisville delivery*, as fully and completely as a delivery to the Bourbon Stock Yards is a Louisville delivery.

We repeat, therefore, that the question involved in this case is really as to *what character of delivery* the Louisville & Nashville Railroad Company can be compelled to make *in Louisville*, and not as to what may be its duty as to *forwarding* cattle by means of connecting carriers to *points beyond Louisville.* In other words, it is really a question of delivery and not a question of forwarding.

Then treating the case as it really is, we come to the question as to whether the Louisville & Nashville Railroad Company in bringing live stock to Louisville has a right to establish a live stock depot in Louisville and insist on delivering all live stock at that depot, or whether it can be compelled to make such deliveries at other points in the city.

It seems to us that this question is practically settled by the opinion of this court in the case of Covington Stock Yards Company vs. Keith, 139 U. S. 128, and it was so considered by the Circuit Court of Appeals, not only in the case at bar but also in a case which went to that court some years ago from Nashville, to wit, Butchers & Drovers Stock Yards Co. vs. L. & N. R. R. Co., 67 Fed. 35.

In Covington Stock Yards Co. vs. Keith, *supra*, it appeared that the Kentucky Central Railroad ran through the city of Covington. The railroad company had by an agreement with the Covington Stock Yards Company made the yards of that company the live stock depot of the railroad company and agreed to deliver all live stock at those yards. Near the Covington Stock Yards, and connected also with the line of the railroad, were the stock yards of one Keith who was engaged in buying and selling live stock both on his own account and on commission. The stock yards of Keith, as just stated, were on the line of railroad, and platforms had for some time been in existence by means of which live stock could be received into those yards directly from the cars of the railroad company and likewise delivered into the cars of the railroad company directly from those yards. The railroad company being in the hands of a receiver this receiver tore up the platform which was necessary for the receipt and delivery of stock between the cars of the company and the yards of Keith; and required Keith to receive and deliver all of his live stock through the yards of the Covington Stock Yards Company. But this was not all. Keith *was required to pay for the privilege of receiving or delivering* his stock through the Covington Stock Yards. Under these conditions Keith filed an intervening petition in the suit in which the receiver of the Kentucky Central Railroad Company had been appointed, and asked for a rule against the receiver to show cause why this live stock should not be delivered to him or received from him at some place other than the Covington Stock Yards.

The substance and effect of the ruling, both of the Circuit Court and of this court, were that the railroad company had a perfect right to establish the Covington Stock

Yards as its live stock depot, by means of a contract between it and the Stock Yards Company to that effect; and that, if it did so, it had the right to receive and deliver all live stock at that depot; that it could not be compelled to receive and deliver live stock at every stock yards that might be established along its line in the city of Covington; but that receipt and delivery of live stock was a part of the transportation thereof, and that the railroad company could not require a shipper or consignee to pay for the receipt or delivery of live stock, or for the use of the live stock depot for that purpose, in addition to the charge for transportation, any more than the railroad company could charge passengers for the use of a passenger depot, or charge ordinary shippers of dead freight for the use of a freight depot, in addition to the charge of transportation. Accordingly this court affirmed the judgment of the circuit court, which in effect had decreed that the receiver should receive and deliver live stock from and to Keith through the Covington Stock Yards *free of any charge* for passing through the same; and that if the stock yards company should refuse to allow this, then that the receiver should put back the platforms necessary to make direct deliveries from the cars of the company to the stock yards of Keith and *vice versa*, and should there receive and deliver all live stock from or to Keith.

In the course of its opinion this court said:

"When animals are offered to a carrier of live stock to "be transported, it is its duty to receive them; and that "duty can not be efficiently discharged, at least in a town "or city, without the aid of yards in which the stock "offered for shipment can be received and handled with "safety and without inconvenience to the public while "being loaded upon the cars in which they are to be

"transported. So, when live stock reach the place to "which they are consigned, it is the duty of the carrier to "deliver them to the consignee; and such delivery can "not be safely or effectively made except in or through "enclosed yards or lots, convenient to the place of unload- "ing; in other words, the duty to receive, transport and "deliver live stock will not be fully discharged, unless "the carrier makes such provision, at the place of load- "ing, as will enable it to properly receive and load the "stock, and such provision, at the place of unloading, as "will enable it to properly deliver the stock to the con- "signee.") P. 134.)

Then after holding that receipt and delivery are a part of transportation, and that the carrier, therefore could not make a charge for receipt or delivery over and above the charge for transportation, the court then concludes as follows:

"We must not be understood as holding that the rail- "road company in this case, was under any legal obliga- "tion to furnish or cause to be furnished, suitable and "convenient appliances for receiving and delivering live "stock at every point on its line in the city of Covington "where persons engaged in buying, selling or shipping "live stock, chose to establish stock yards. In respect to "the mere loading and unloading of live stock, it is only "required by the nature of its employment, to furnish "such facilities as are reasonably sufficient for the busi- "ness at that city. So far as the record discloses, the "yards maintained by the appellants are, for the purpose "just stated, equal to all the needs at that city, of ship- "pers and consignees of live stock; and *if the appellee "had been permitted to use them, without extra charge for*

"*mere yardage, they would have been without just ground* "*of complaint in that regard*; for it did not concern them "whether the railroad company itself maintained stock "yards, or employed another company or corporation to "supply the facilities for receiving and delivering live "stock it was under obligation to the public to furnish." (P. 136.)

And accordingly the court affirmed the judgment of the Circuit Court, which, as heretofore said, had in effect provided that if the railroad company should receive and deliver Keith's live stock through the Covington Stock Yards (its live stock depot) without charge to Keith, then it should not be required to receive or deliver from or to him at his own yards; but that unless the railroad company would receive and deliver from and to him, free of charge, at the Covington Stock Yards, then it must do so at Keith's own stock yards. Thus this court in that case distinctly settled the proposition that a live stock depot for a railroad company handling live stock is absolutely essential for such a locality, for example as the city of Covington; but that, if the railroad company establishes a depot, whether by erecting the necessary appliances itself, or by making a contract with some other corporation owning stock yards, it can then lawfully insist upon receiving and delivering all the live stock of that market at that depot, and can not be required to make deliveries elsewhere.

An attempt is made to distinguish that case from the case at bar by saying that in the Keith case the court was simply speaking of the actual duty of loading and unloading, in the sense of driving the cattle out of the car, or into the car, as distinguished from a mere delivery in car load lots in the car. But that was not the point in the Keith case; Keith had

already established his own facilities for receiving and delivering, such as yards and pens and chutes; and the controversy between the parties in that case was not over the question as to who should drive the cattle out of the car into the pen, or out of the pen into the car, but it was as to whether or not Keith could require the railroad company to deliver car loads of cattle at his stock pens, where he could take them out free of expense, or whether the railroad company could insist upon delivering and receiving all his stock at the yards of the Covington Stock Yards Company, and could charge him for the use of such conveniences over and above the charge for transportation. Of course, Keith would greatly have preferred that the live stock should be received from him or delivered to him at his own yards, rather than at the yards of the Covington Stock Yards Company; but this court held that if the railroad company and the stock yards company, under their joint arrangement, would permit the stock of Keith to be received and delivered *without charge* through the stock yards of that company, this was *all he could demand;* or, in other words, to use the language of this court, that if this had been permitted then he "would have been without just ground of complaint."

It seems to us that the principles settled in Covington Stock Yards Company vs. Keith are controlling in the case at bar; and, as heretofore suggested, the Circuit Court of Appeals so held, not only in this case, wherein the opinion was delivered by Judge Day, now Mr. Justice Day, but so held also in the preceding case of Butchers & Drovers Stock Yards Co. vs. L. & N. R. Co., 67 Fed. 35, in which the opinion of the Circuit Court of Appeals was delivered by Judge Taft.

In this last case of Butchers & Drovers Stock Yards Co. vs. L. & N. R. Co., 67 Fed. Rep. 35, Judge Taft also dis-

cusses another question which is pertinent to one point made in the case at bar, although no very great stress has been laid upon it. Some complaint is made to the effect that because the Louisville & Nashville Railroad Company makes under certain circumstances special deliveries of *dead freight*, therefore, it is a discrimination against the Central Stock Yards, and against live-stock traffic, to refuse to make special deliveries of *live stock*. This exact question was made in the case above mentioned of Butchers & Drovers Stock Yards Co. vs. L. & N. R. Co., and the court in its opinion by Judge Taft disposes of that complaint in the following language, to wit:

"The evidence clearly shows that the delivery of car-
"load lots of dead freight, and the receipt of them by
"side tracks is much less onerous, and involves much less
"care and responsibility for the railroad company than
"the receipt of live stock from a private yard by a side
"track. One of the chief reasons why deliveries and
"shipments of railroad car load lots by side track are
"possible and consistent with the conduct of the business
"of a large trunk line is that the loaded car may stand
"upon the side track for hours, or even a day, until the
"railroad company finds it convenient to back its engine
"down and take it. Such delays are utterly impossible
"in the proper transportation of car loads of live stock.
"When they are loaded they must be moved. The
"evidence shows that in other respects the supervision of
"the switching of cattle cars would be much more
"expensive and troublesome to the railroad company
"than dead freight. Indeed it hardly needs expert
"evidence to establish it. There is no ground, therefore,
"for any charge of unjust discrimination against the

"defendant railroad company as between complainant "and the front street shippers." (The front street shippers being shippers of dead freight.) 67 Fed. 42.

In the case at bar this difference between the handling of live stock and dead freight is fully shown in the testimony of Mr. Walker D. Hines, Vice President of defendant (Rec. 13), and is not controverted. In fact it is shown by all the evidence in the case.

Counsel for appellant in their brief constantly refer to the cases of Coe vs. L. & N. R. R. Co. 3 Fed. 775, and McCoy vs. C. I. St. L. & C. R. R. Co. 13 Fed. 3. These are two Circuit Court cases decided by Judge Baxter; in which he held in effect, that a railroad company could not, by contract with a stock yards company, establish the railroad company's live stock depot at those stock yards, and refuse to receive and deliver live stock at other stock yards in the same city; that to do so would be an unlawful discrimination against the other stock yards; and in which he by mandatory injunction required the railroad companies to receive and deliver live stock at the other stock yards on the same terms and in the same manner as at the stock yards which the railroad company had made its depot.

Those decisions by Judge Baxter were made in 1880 and 1882, long before this court decided the case of Covington Stock Yards Co. vs. Keith, 139 U. S., *supra*, and before the Circuit Court of Appeals decided the case of Butchers and Drovers Stock Yards Co. vs. L. & N. R. R. Co., 67 Fed., *supra*, and are utterly inconsistent with the decisions of this court and of the Circuit Court of Appeals in the two cases mentioned. Moreover, Judge Baxter relies in part as authority for the procedure taken by him on what are known as the Express Company Cases, as those cases were decided *in the*

Circuit Court, his decisions being rendered prior to the action of this court which *reversed* the judgments of the Circuit Courts in the Express Company Cases (Express Company Cases, 117 U. S. 1).

This would seem to be a sufficient statement to dispose of Judge Baxter's two Circuit Court decisions; yet they are constantly referred to and strongly relied on by counsel for appellant in the case at bar.

An attempt is made to distinguish between the case at bar, on the one hand, and that of the Covington Stock Yards Co. vs. Keith, 139 U. S., *supra*, and Butchers & Drovers Stock Yards Co. vs. L. & N. R. R. Co., 67 Fed., *supra*, by saying that in the last two mentioned cases the stock yards of the complainants were situated directly upon the line of the railroad company, whereas in the case at bar the Central Stock Yards are not situated on the line of the L. &. N. R. R. Co., but are situated a few hundred yards away from that line, and are upon the line of the Southern Railway Company, which crosses the line of the L. & N. R. R. Co. It is therefore said that the Central Stock Yards Company does not ask the L. & N. R. R. Co. to make a delivery of cars containing live stock directly to *it*, but to make such delivery *to the Southern Railway* at the point where there is a physical connection between the tracks of the two railroad companies, after which the Southern Railway will make the delivery to the Central Stock Yards.

In other words, the contention amounts practically to this: That if there were stock yards situated on the line of the Louisville & Nashville Railroad Company at Seventh and Magnolia (point C on the map), which is a point of physical connection between the tracks of the Louisville & Nashville Railroad Company and those of the Southern Railway, in such case the Louisville & Nashville Railroad Company

could not, under the principles of Covington Stock Yards Company vs. Keith, be required to deliver live stock on a siding *belonging to these stock yards* at Seventh and Magnolia, but that it *can be* required to make such a delivery *at that same point on a siding belonging to the Southern Railway Company*. But, if we are to regard substance in this matter, it must be perfectly apparent to the court that, if the Louisville & Nashville Railroad Company can be deprived of the right to make all deliveries at *its own live stock depot*, and can be required to make deliveries of its cars containing live stock *at some other point* in the city, it would very much rather deliver them directly to another stock yards company having a side track connection with its own track (in which event it would retain control of its cars) than to deliver such cars to *another railroad company* at a side track connecting with that company's track (in which event the latter company would get control of the cars). So far as the loss of advantage in being allowed to deliver all live stock cars at one place is concerned, it is exactly the same in one case as it is in the other. It is just as much trouble and inconvenience, just as much additional annoyance, to be required to take a carload of live stock and deliver it on a side track *connecting with the Southern Railway* at Seventh and Magnolia Avenue as it would be to deliver the same car on a side track at the same place *connecting with a stock yard*, if one happened to be located there at Seventh and Magnolia Avenue. There would be just as much necessity for prompt delivery, owing to the necessities of the live stock, in the one case as in the other; just as much necessity, therefore, for putting aside other work and giving preference to this special delivery to the side track of the Southern Railway, as to the side track of a stock yards that might be located at the same place as the Southern Railway's connection.

But, while the loss of advantage in not being allowed to make all deliveries at its own depot, and the inconvenience and trouble and expense, and disarrangement of other traffic, would be just the same, whether the special delivery be required to be made upon a side track connecting with the Southern Railway or upon a side track connecting with another stock yards, yet, as a matter of fact, if required either to make a direct delivery on the side track of *another stock yards* connecting with its own track, or to make a delivery to *another railroad company* for delivery at another stock yards, the railroad company bringing the stock to the city would *very much rather make the delivery direct to the stock yards on a side track connecting with its own track, than to make such delivery to another railroad company;* because in the first case the railroad company would *retain the control of its own cars*, whereas in the second case it would be compelled to *turn those cars over to another railroad company*, and take the risk of the second company's failure to make a prompt return thereof. If the side track of the stock yards connected directly with the tracks of the Louisville & Nashville Railroad Company, that Company would have complete control over the cars set on the side track of the stock yards, and could simply run in upon that side track and take the car away whenever it felt like doing so. But if once the car is delivered to the Southern Railway, and taken into the possession and under the control of that company, it simply depends upon that company as to when that car will be returned. It may be promptly returned, or it may be greatly delayed. The fact that railroad cars taken into the possession of the connecting carrier are often greatly delayed before being returned, and that this has given rise to most serious complaints by different railroad companies against others, is a notorious fact, and any railroad company would rather

keep possession of its car, if possible, than to turn it over into the control of another railroad company, a matter to which we will hereafter refer in another connection.

It must be manifest, therefore, that if the Louisville & Nashville Railroad Company has a right to establish a live stock depot in a particular city through the instrumentality of the Bourbon Stock Yards Company which engages to provide the necessary facilities, and to contract that it will not deliver live stock elsewhere, this advantage can not be taken from it, and this principle evaded, by simply establishing the Central Stock Yards, not directly on the line of the Louisville & Nashville Railroad, but a little distance off of the line of that road, and upon the line of the Southern Railway, and by then insisting that the delivery of the cars of live stock shall be made, not directly to the stock yards, but to the Southern Railway for delivery to those stock yards; as the loss of advantage and the inconvenience to the Louisville & Nashville Railroad Company in being forbidden to deliver solely at its own depot, and in being required to deliver to the Southern Railway at its connection therewith, are just as great as if the delivery were required to be made to a stock yards directly upon a line of the Louisville & Nashville Railroad, whereas the fact that in case of delivery to the Southern Railway that company would get possession and control of the Louisville & Nashville Railroad Company's cars, while in case of delivery to a stock yard direct upon its own track, the Louisville & Nashville Railroad Company would itself retain control af its own cars, would, of course, make it prefer the direct delivery to the stock yards over a delivery to the Southern Railway for delivery to the stock yards.

In conclusion upon this point we repeat that when the real nature of this case is understood it is seen to be a case

which does not properly involve the principles governing the exchange of traffic between connecting carriers, or the duty of a railroad company to receive shipments destined to points beyond its own line, and to carry the same to such distant point, or to forward the same by another connecting carrier. It is really a case, such as the Butchers' Stock Yards case, in 67 Fed. Rep. 35, and the Covington Stock Yards case in 139 U. S. 128, governing the question of the duty of a railroad company as to making *deliveries of live stock when the same has reached its destination.* And we submit, under the principles of the cases mentioned, that when live stock is offered to the Louisville & Nashville Railroad Company in Tennessee for transportation to the city of Louisville, and destined to stop at the city of Louisville, the Railroad Company can say that it will deliver the same at its live stock depot in that city, but that it will not deliver it at any other point, either directly to a stock yards company, or a butchering and packing company on its own line, or to another railroad company for the purpose of being switched to such stock yards or packing establishment; and the fact that the Central Stock Yards happens to be a few feet outside of the boundary of the city of Louisville, and that the Southern Railway has chosen to call that a "station," does not present a case different in the slightest degree from what it would be if the Central Stock Yards were situated a few feet west of where they are, so as to bring them within the city boundary, or if the Southern Railway had not chosen to call it a station; for we have already seen that it is perfectly plain that all parties consider the Central Stock Yards as a Louisville institution, so much so that the contract between it and the Southern Railway makes it the Louisville live stock depot of that railway.

As bearing upon the question of the difference between forwarding freight by a connecting carrier, as those expres-

sions are ordinarily understood, and on the other hand, merely turning over freight which has reached its destination to another company, to be delivered at a particular point in a city, we refer the court to the case of Western, &c., R. Co. vs. Exposition Cotton Mills, 81 Ga. 522 (7 Southeastern Rep. 916), and also to the case of Nanson vs. Jacob, 12 Mo. App. 125, subsequently affirmed in 93 Mo. 331.

IV.

Through Routing.

It seems to us the consideration already suggested should be conclusive of this case, for, as heretofore said, it is not a case legitimately involving the question of the duty of a railroad company either to carry to a point beyond the terminus of its own line, or to deliver to a connecting carrier for that purpose; but it is a case which legitimately only involves the question as to the duty of a railroad company to deliver live stock when its destination is the terminus of the receiving company's line. But if we should be mistaken in this proposition, and if this is a case which legitimately involves the consideration of the duty of a railroad company as to freight tendered to it which is destined to a point beyond its line and on some connecting carrier's line, and especially where the shipper demands that the freight go forward on the connecting line *in the cars of the receiving company*, then let us see what is the law on this subject.

We ask the court particularly to remember that this is not a case where a railroad company has *received* freight, and issued a bill of lading for it, *destined to a point beyond its own line*, and where the same has been lost or

delayed on the connecting line. Neither is it a case where, having *received* such freight and issued its bill of lading, showing a destination beyond the company's own line, there has been a loss during the act of transferring to the connecting line. It is out of those two classes of cases that we so frequently find litigation arising as to whether the first company contracted to carry to the ultimate point of destination beyond its own line, or as to whether it simply contracted to carry to the terminus of its own line and then to deliver to a connecting line to be by it carried to destination. Frequently, also, in such classes of cases, where it is conceded that the contract was only to deliver to a connecting line, we find controversies arising as to whether the delivery has been complete at the time of some loss, or as to whether proper shipping directions have been transmitted, etc. But in the case at bar it is not alleged that the Louisville & Nashville Railroad Company has violated any obligation as to any freight which it has accepted marked for a destination beyond its own line, or for which it has issued any bill of lading showing its destination to be a point beyond the line of the Louisville & Nashville Railroad. The sole complaint is that it *will not accept* live stock destined for the Central Stock Yards, which complainant says is beyond the line of the Louisville & Nashville Railroad company; and *will not issue a bill of lading* showing said Central Stock Yards to be the destination of the stock; but that it will only accept live stock destined for a point on its own line; and *that it will not turn over its cars containing such live stock to a connecting line, and accept the undertaking of the connecting line to return the cars and to collect and account for the freight charges.*

Counsel for complainant (appellant) in their brief in this court insist that the Circuit Court of Appeals misconceived

the nature and scope of the relief sought. We do not think so. It is true, in the brief there are concessions and offers made, which nowhere appear in the bill, or anywhere else in the record, and which were evidently never thought of at the time the bill was drawn or filed. But the demands, even as stated in the brief, are without any justification in law, common or statutory, as we understand it, and as the Circuit Court of Appeals understood it.

In the brief it is said that of course defendant Railroad Company has the right to demand *prepayment of its freight charges*, and that complainant never meant to ask relief on any other condition. (Brief p. 40.) Yet there is no intimation of anything of this kind in the bill, but on the contrary it expressly alleges that the connecting railroad company (Southern Railway) has offered and "is now willing to be responsible, from such points of connection, for the delivery of such live stock, and *the collection of all charges on same*, and would promptly return to such points of connection all empty cars, and *account for all freight charges in the usual way*." (Rec. 3.) And, furthermore, a witness (T. C. Powell, agent of the Southern Railway) was introduced to prove that the Southern Railway had notified the defendant that the Southern would be thus responsible, and "that it is the universal custom between reputable and solvent railroad companies to make delivery of car load lots of freight of any and all kinds, *without exacting prepayment of freight*, under notices of the character above set forth, *where the receiving common carrier becomes responsible for such delivery and collection of all charges on same*." (Rec. 25.)

It is true, this was denied and contradicted by defendant, but what was the purpose of this allegation in the bill, and this testimony of a witness, if complainant always conceded defendant's duty to carry only on *prepayment of charges*, and

if "nothing more is asked or intended to be asked by said bill." (Brief p. 40.)

But aside from this question of prepayment of charges, let us look at the demands as outlined in the brief. Counsel say:

> "This court is simply asked to compel the Louisville "& Nashville Railroad Company, as it is its duty to do, to "receive shipments from owners and consignors of live "stock, and to show upon said bill of lading, as in its live "stock contract filed, the destination of said shipment, "and to deliver same to the connecting carrier; . . . "and the law requires him to also deliver to such connect- "ing carrier, on the delivery of such freight, the instruc- "tions of the shipper as to destination; and the contract "filed shows a blank left to indicate destination;" (Brief, p. 38) and to this statement of demand, here made, is added the additional claim later in the brief, that "the initial "carrier . . . must deliver same, *without breaking* "*bulk*, that is, *without unloading*, and must *permit its cars* "*to be used to the destination of said shipment.*" (Brief, p. 55.)

Furthermore, complainant filed the printed form of contract, above referred to, and counsel say in their brief this is "such a contract as was suggested to the court, upon the hearing, should be entered into by the Louisville & Nashville Railroad Company, as to shipments of live stock tendered to it, destined to the Central Stock Yards." (Brief, p. 37.) And when we turn to that form of contract we find it contains a blank for a date, also a blank for the name of the consignee and the destination (which blank as to destination complainant desires to have filled with Central Stock Yards,

a point on the line of the Southern Railway), and also a blank for a guaranty that the freight rate "from point of shipment to destination" shall not exceed a certain sum. (Rec. 58.)

This is the demand expressed in the brief, and amounts to this, that the Louisville & Nashville Railroad (1) accept live stock, say at Nashville, Tenn., which the shipper desires to consign to some one in or near Louisville, but at a point off the line of the Louisville & Nashville Railroad, and on the line of a connecting railroad; and (2) that it issue a bill of lading showing the destination to be at a point off its line and on the connecting carrier's line; and (3) that it guarantee that the freight rate "from place of shipment to destination" shall not exceed a certain sum; and (4) that it load that stock in one of its cars and carry same to Louisville; and (5) that there, at some point of physical connection with the Southern Railway, it deliver its (L. & N.) car, with the stock in it, to the Southern Railway, to be by it carried to Central Stock Yards and the stock delivered from it to the consignee at that place.

And just in this connection we may ask *what is to become of the car after it is thus taken by force from the possession of the owner?* Who is to see to its return? Who is to pay the owner for the use of it, while it is gone from his possession? Who is to pay the value of it, if it is never returned? Or again, if upon final delivery of the cattle by the connecting carrier, and the inspection thereof by the consignee, it is found that some of them have been injured in transit (as often happens), who is to fix the responsibility for this injury; who is to pay for it, or how is it to be shared by those who have participated in the carriage? All of these are matters which are covered by contract between the connecting carriers in case of the voluntary interchange of cars; but how are they to be settled *in the absence of contract?*

These are questions which complainant does not undertake to answer, because they do not interest it. It prefers to let the other party "walk the floor." We had supposed complainant was possibly endeavoring to suggest a solution of this difficulty, when in its bill it stated that the Southern Railway was *willing to agree* with the defendant to be responsible for some of these matters. But when the Circuit Court of Appeals said it had no power to compel defendant to make such an agreement, nor power to make such an agreement for defendant, the response made in the brief filed in this court is that the Circuit Court of Appeals "misconceived the nature and scope of the relief sought by the complainant." We do not think it did. We think it understood the situation exactly.

As to one of the demands of complainant above outlined, counsel may claim they did not mean to demand a guaranty of a certain rate "from place of shipment to destination." That would be the effect of a contract made on the form filed by complainant as a model of what it wanted; but waive that, and still the questions asked above demand an answer, for complainant undoubtedly demands that defendant *give up its cars* to the possession and control of another, to be used by the latter in finishing the transportation and delivery of the cattle in them to the consignee. And so long as this is true, the questions asked above call for an answer.

The demands of the complainant being as above outlined, whether we look to its bill or to the brief of its counsel, the question therefore arises in this case, is it the duty of a railroad company either at common law, or under the Interstate Commerce Act, to accept freight marked for a destination beyond the line of that company, and to issue a bill of lading showing such a destination; and is it in any event its duty to *deliver its own cars containing such freight*

to a connecting carrier, in order that the freight may be transported without change of cars to a point beyond the receiving company's line?

A. In the brief of counsel for appellant is a discussion of what are said to be the "common law duties of common carriers"; and reference is made to many authorities on the proposition that "in the absence of any agreement, either express or clearly implied, for transportion beyond its own lines, the common law duty of an independent carrier is performed by safely transporting the goods over its own line and delivering them to the consignee or connecting carrier, as the case may be."

The quotation just made is from Elliott on Railroads, Volume 4, Section 1432. But, if the authorities cited either by counsel for complainant or by Elliott in support of this proposition be examined, it will be found that they are all upon the question as to what is the duty of a common carrier when it has once *accepted* for transportation *goods marked to a destination beyond the carrier's own line.* And in the vast majority of the cases it will be seen that the carrier had not only accepted goods thus marked, but had issued a bill of lading expressly agreeing to deliver to a connecting carrier. They, with one exception, *do not bear upon the question of the duty of a common carrier to accept goods marked for a destination beyond its own line.* The one exception to this statement is Inman & Co. vs. St. Louis, etc., R. Co., 37 S. W. Rep. 37, decided by the Civil Court of Appeals of Texas, an intermediate appellate court, in which the court does seem to hold that a carrier was required at common law to accept goods for a point beyond its line. It is difficult, however, to understand why the court in that case found it necessary to discuss or decide this proposition, as the case was completely covered by a Texas statute (there

being no question of interstate commerce involved), and the court itself so holds.

We think the foregoing statement is sufficient to dispose of the authorities cited in the brief of appellant on the subject of the common law duty of carriers in the respect mentioned.

Let us, however, see if we can arrive at the law upon this subject from an examination of other authorities.

In Hutchinson on Carriers, Section 145, this careful author lays down the following proposition, which, so far as we know, is undisputed:

> "No carrier is bound by law to accept goods for car-
> "riage further than the terminus of his own line, and if
> "in any case, therefore, he is to become liable as a carrier
> "beyond such terminus, *his liability must be based upon*
> "*some further obligation than that created by law.*"

Starting with this fundamental proposition, there has arisen a diversity of opinion as to what is the effect *if the carrier does accept* goods marked to a destination beyond the carrier's own line. The diversity of opinion on this subject has given rise to what are called the English rule and the American rule, some American courts adopting the English rule, but the great majority of them, including the Supreme Court of the United States, adopting a different rule, called the American rule.

The English rule adopted in what is known as Muschamp's case (Muschamp vs. Lancaster & Preston R. Co., 8 Mee. and Wels. 421), decided in 1841, is that, if a common carrier accepts goods marked for a destination beyond his own line, this is *prima facie* evidence of a contract to carry to the destination as marked; whereas the American rule, as

asserted, for example, in Myrick vs. Michigan Central R. Co., 107 U. S. 102, is that from the mere acceptance of goods marked to a destination beyond the carrier's line the law will not imply an obligation to carry to this destination, but only to deliver to a connecting line for such purpose, so that the liability of the receiving company as common carrier ceases with such delivery.

In Muschamps case above referred to (8 M. & W. 421) the reasoning of Lord Abinger was as follows:

> "The simple question in this case is, whether the "learned judge misdirected the jury in telling them that, "if the case were stripped of all other circumstances "beyond the mere fact of knowledge by the party that "the defendants were carriers from Lancaster to Preston, "and if, under such circumstances, they accepted a parcel "to be carried on to a more distant place, they were liable "for the loss of it, this being evidence whence the jury "might infer that they undertook to carry it in safety to "that place. I think that in this proposition there was no "misdirection. It is admitted by the defendants' counsel "that the defendants contract to do something more with "the parcel than merely to carry it to Preston. They say "the engagement is to carry to Preston and there deliver "it to an agent who is to carry it further, who is after- "wards to be replaced by another, and so on, until the "end of the journey. Now, this is a very elaborate kind "of a contract . . . Is it not, then, a question for the jury "to say *what the nature of this contract was?*"

In other words, Lord Abinger's reasoning was that by the acceptance of the goods marked for a destination beyond the carrier's line it was conceded that *some kind of a contract was*

made, the difference between the contentions of the two parties being that plaintiff contended that a contract was thereby made to carry to the destination marked, whereas the defendant contended that it was only a contract to carry to the terminus of its line and there to deliver to a connecting carrier. In either event, reasons Lord Abinger, there is an admitted contract to do something more than simply carry to the terminus, and it is a question for the jury to say *how much more* than this the defendant contracted to do, it being a reasonable inference, in Lord Abinger's opinion, that it intended thereby to contract for a carriage to the ultimate destination.

Now, when we remember that it is universally conceded that a railroad company is not bound under its common law obligation as a carrier to carry beyond its own line, and that, if it does undertake to do so, this is entirely a matter of voluntary contract, does it not necessarily follow from the reasoning of Lord Abinger that the carrier can not be *required* to accept goods marked to a destination beyond its own line? It seems to us that it does. The courts say to him: You are not bound under your common law duty to carry beyond your line: but if you accept goods marked for a destination beyond your line, this will be received as *prima facie* evidence of a voluntary contract to increase your common law duty, and to carry to the destination as marked. It must necessarily follow, therefore, that in the opinion of Lord Abinger, and of all the courts which have followed his opinion, the common law imposed no obligation on the carrier to accept goods marked for a destination beyond his line.

Now the American courts have not indicated any dissent whatever from this conclusion as to the common law obligation of the carrier. Their rulings have simply been *more favorable to the carrier* than the English rulings as to the

interpretation which they put upon the carrier's act if he does accept goods marked to a destination beyond his line. While the English courts (and such of the American courts as follow them) interpret the acceptance by the common carrier of goods thus marked as evidence of a contract to carry to destination, the American courts interpret such act of acceptance merely as a contract to deliver in safety to a connecting carrier. Not only is there nothing in the American cases contrary to the proposition just asserted, but we think the case heretofore mentioned, and which is relied on by appellants as "an instructive case on the common law duties of common carriers," to wit, Myrick vs. Michigan Central R. Co., 107 U. S. 106, directly supports the conclusion we have just asserted. That was a case in which the carrier had accepted goods and issued a bill of lading showing that the ultimate destination was a point beyond the carrier's line. The question was as to the effect of this acceptance. Speaking on that subject, the court, through Mr. Justice Field, said:

> "A railroad company is a carrier of goods for the pub-
> "lic, and, as such, is bound to carry safely whatever
> "goods are intrusted to it for transportation, within the
> "course of its business, to the end of its route, and there
> "deposit them in a suitable place for their owners or
> "consignees." (Page 106.)

The foregoing is a complete sentence in the court's opinion, and is, we think, a complete statement of the duty of a common carrier in the matter of transportation and delivery. Having asserted this proposition, the court then adds the following:

> "*If* the road of the company connects with other
> "roads, and *goods are received* for transportation beyond

"the termination of its own line, there is superadded to "its duty as a common carrier that of a forwarder by the "connecting line; that is, to deliver safely the goods to "such line, the next carrier on the route beyond. *This "forwarding duty arises from the obligation implied in "taking the goods for the point beyond its own line.*" (Our italics.)

The court then proceeds to show that while the English courts have adopted the rule heretofore explained as to the effect of accepting goods for a point beyond its own line, yet the American rule is otherwise, referring to the preceding case of Railroad Co. vs. Manufacturing Co., 16 Wall. 318, which was likewise a case where a railroad company had accepted goods and issued a bill of lading expressly stating the destination to be a point beyond its line and in effect agreeing to deliver to a connecting carrier, the question being whether this constituted a contract to carry through or only a contract to forward.

Now we submit that it is plain from this language of the court, in the words of Mr. Justice Field, that the common law duty of a common carrier is simply to carry to a destination on its own line and there deliver to the owner or consignee; but that if it does voluntarily accept goods for a destination beyond its own line, then under the American rule an obligation will be implied from this act to deliver to a connecting carrier for transportation to the destination as marked. These two cases of high authority, to wit, Muschamp's case under the English rule, and Myrick vs. Michigan Central R. R. Co. under the American rule, seem to us clearly to show that both in England and America the carrier's common law duty, independent of any contract, express or implied, has been considered to be simply to carry to some

destination on his own line, and only to receive goods destined for some point on his own line; but that if he does choose to receive goods destined for a point beyond his line, then an implied contract will arise to do more than his common law duty, and either to carry to the ultimate destination of the goods (under the English rule) or deliver to a connecting carrier for that purpose (under the American rule). We shall make no attempt to examine or cite any other cases on this question of common law liability. The name of cases which have been decided and reported upon this subject is legion. The two cases which we have cited seem to us sufficient to establish the proposition for which we contend, as heretofore expressed.

B. When we pass from general considerations as to the duties of carriers with reference to freight in any form, to the specific question arising in this case as to whether or not, either at common law or under the Interstate Commerce Act, a railroad company can be required to receive freight destined for a point beyond its own line, and load it into its cars, and then, after transporting same over its line, be compelled to deliver its cars with the freight in them to another railroad company, to be transported to the ultimate place of destination, looking to the connecting carrier for the return of the cars, and compensating for their use, the authorities are even plainer than upon the general propositions we have been heretofore discussing.

From the standpoint of the common law, without regard to the provisions of the Interstate Commerce Act, we have the authority of this court in the case of Atchison, etc., R. Co. vs. Denver, etc., R. Co., 110 U. S. 667. In that case there was a physical connection betweeen the tracks of the Atchison, Topeka & Santa Fe R. Co. and those of the Denver & New Orleans Railroad at a point some little distance from the

depot of the former company. The Atchison Company had formed a through line with a third company, with which it exchanged business, including cars, and over which through bills of lading for freight, and checks for passengers, were issued and sold. An effort was made by the Denver, etc., R. Co. to compel the Atchison, etc., R. Co. to exchange cars with it, at the aforesaid point of connection, and also to issue through bills of lading, through checks, etc.

This court held that, although there was a physical union between the two tracks at the place above mentioned, yet the Atchison Company was not required by any common law principle to establish the character of business relations desired by the Denver Company. After an extended examination of this subject the court concludes this branch of the case as follows:

"This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The legislature can not take away the right to a physical union of two roads, but whether a connecting business shall be done over them after the union is made depends on *legislative regulation*, or *contract obligation*. An *interchange of cars*, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars." (P. 683.)

The court having already said in a preceding part of its opinion that the Atchison Company was not required to stop at this junction, it follows, of course, that it was not required to exchange cars at the junction, either by delivering cars to the Denver Company or by receiving cars from the Denver Company. It is said in the case at bar that the Louisville & Nashville Railroad Company does exchange cars under some circumstances with the Southern Railway at their connection in Louisville. It is true that it does do this under certain circumstances. But whenever it does it, it is pursuant to a voluntary contract or arrangement between the two companies. And it has never voluntarily exchanged cars with the Southern Railway destined to or originating at what is called "Central Stock Yard Station." *It has never recognized such a place as a station for which it would receive, or to which it would deliver, freight of any kind.* And in the case just cited the court expressly held that a railroad company has the right to locate its stations, and that, in the absence of contract or statutory right, a court of equity can not compel it to locate a station at one place, because it has located another one somewhere else. (110 U. S. 682.)

Considered from the standpoint of the Interstate Commerce Act, we can not point to any decision by this court upon the question under discussion as to the compulsory interchange of cars between connecting railroad companies; but we can point to a number of decisions by the courts next in authority to this court, and to opinions delivered by eminent judges, some of whom have since become members of this tribunal. That the Interstate Commerce Act does not require the formation of through routes, or the interchange of cars between connecting lines, has been expressly determined not only by the Court of Appeals for the *Sixth Circuit* in the case at bar, in an opinion by Judge Day, now

Mr. Justice Day, but also by the Court of Appeals for the *Ninth Circuit* in the case of Oregon Short Line R. Co. vs. Northern Pacific R. Co., 61 Fed. 158, in an opinion by Judge McKenna, now Mr. Justice McKenna, and also by the Court of Appeals for the *Eighth Circuit* in Little Rock & Memphis R. Co. vs. St. Louis Southwestern, etc., R. Co., 63 Fed. Rep. 775, in an opinion by Judge Thayer, and was also decided by the late Judge Jackson, afterward Mr. Justice Jackson, in the case of Kentucky & Indiana Bridge Co. vs. L. & N. R. Co., 37 Fed. Rep. 567, 630, in an opinion in which the powers of that great judge were probably as clearly exhibited as in any opinion he ever wrote. Moreover, the decision above mentioned by the Circuit Court of Appeals of the Ninth Circuit was an affirmance of a judgment to the same effect rendered by Mr. Justice Field in Oregon Short Line R. Co. vs. Northern Pacific R. Co., 51 Fed. 465. The same question was likewise decided in the same way by Judge Caldwell in Little Rock, etc., R. Co. vs. St. Louis, etc., R. Co., 41 Fed. Rep. 559. And the principle underlying the proposition is decided also by the case of Chicago, etc., R. Co. vs. Osborne (52 Fed. 915), in an opinion by Mr. Justice Brewer; the principle being that connecting companies can not be compelled to contract with each other.

These decisions as to the effect of the Interstate Commerce Act on this question of the formation of through routes and the interchange of cars have been largely influenced by a comparison between the provisions of the Interstate Commerce Act and those of the English Railway and Canal Traffic Act, upon which it is known that the Interstate Commerce Act was largely modelled. The difference between the two acts, and the striking fact that the English act contains an express provision for the formation of *through routes* over connecting lines, and for the establishment of through

rates, while the American act, modeled after it, wholly omits this provision, was early noticed by the Interstate Commerce Commission, and the attention of Congress called to that fact and an amendment to the act suggested by the commission itself, which amendment, however, was not adopted and never has been adopted.

Extracts from the English Railway and Canal Traffic Act will be found in the opinion of the Interstate Commerce Commission in Little Rock, etc., R. Co. vs. East Tennessee, etc., R. Co., 3 Interstate Commerce Commission Reports, 1, 6, and also in an appendix to this brief, from which it will be seen that the English statute, after using practically the language which we find in the third clause of the Interstate Commerce Act, as to affording facilities for the interchange of traffic, then contains the further provision that:

> "Said facilities to be so afforded are hereby declared to "and shall include the due and reasonable *receiving, for-* "*warding and delivering* by every railway company and "canal company, at the request of any other such com- "pany, of *through traffic to and from the railway or* "*canal of any other such company*, at through rates, tolls "or fares, etc."

Then following this language in the English act is a number of provisions establishing a system for the enforcement of it, which system in effect provides for an attempt as between the carriers themselves to establish the route and to fix the rates, and then authorizes the commission, in the event the carriers can not agree or will not agree, to take the matter up and establish, or refuse to establish, the route as a through route, and to determine upon the question of rates. (3 Interstate Commerce Commission Reports, p. 7.)

No such provision as this is found in the Interstate Commerce Act; and the commission on December 1, 1888, the year after the passage of the act, recommended to Congress the adoption of an amendment to the act, the first sentence of which is as follows, to wit:

> "The facilities to be so afforded shall include the due "and reasonable receiving, forwarding and delivering by "every such common carrier at the request of any other "such common carrier, of through traffic at through "rates or fares."

Then following this language comes further provision in the suggested amendment as to how this provision might be enforced; the substance of the suggestion being that if the carriers can not agree, then the commission shall take up the matter, and

> "The commission shall then have power to determine "whether, having regard to all the circumstances, the "route proposed is demanded in the public interests and "is a reasonable route for the traffic, and if the commis- "sion shall so find, and the rate or divisions are not "assented to, the commission shall have the further "power to prescribe the same." (2 Interstate Commerce Commission Reports, p. 511. See also appendix hereto.)

The recommendation of the commission, as thus made on December 1, 1888, was again repeated by it in its decision of the case of Little Rock,etc.,R. Co. vs. East Tennessee,etc.,R. Co., 3 Interstate Commerce Commission Reports, 1, 15. This latter recommendation was made on March 25, 1889. Fifteen years have now passed since that recommendation was first

made by the commission, and, although the act has been several times amended in other respects, it has never been amended in this respect. But this omission by Congress is made still more striking, and practically conclusive, by the fact that since that recommendation by the commission the matter has been referred to and made the basis of a number of decisions by the Circuit Courts and Circuit Courts of Appeals of the United States, and still Congress has failed to act.

As early as January, 1889, Judge Jackson in the case of Kentucky & Indiana Bridge Co. vs. L. & N. R. Co., 37 Fed. Rep. 567, referring to the Interstate Commerce Act and the powers of the commission thereunder, said:

> "*Neither is the commission invested with authority to* "*establish through routes, or to fix through rates, between* "*connecting lines.* The English act of 1873, amendatory "of the act of 1854, did confer such authority, in pro- "viding that 'the said facilities to be afforded are hereby "declared to, and shall, include the due and reasonable "receiving, forwarding and delivering by any railway "and canal company, at the request of any other such "company, of through traffic to and from the railway or "canal of any other such company, at through rates, tolls "or fares.' . . . Our act to regulate commerce contains "no such provision, and confers no such authority. The "English cases under the act of 1873, cited by counsel, "can not, therefore, have any bearing upon the present "case and need not be referred to." (Page 630.)

It will be observed that Judge Jackson here distinguishes, and distinguishes properly, between "through routes" and "through rates," and says the commission is not authorized to establish *either*.

This decision was followed by Judge Caldwell, in March, 1890, in the case of Little Rock, etc., R. Co. vs. St. Louis etc., R. Co., 41 Fed. Rep. 559, 563.

It was again followed by Mr. Justice Field, in June, 1892, in Oregon Short Line etc., R. Co. vs. Northern Pacific R. Co., 51 Fed. Rep. 465, where the effort was being made, not to compel one company to *give* its cars to another, but to compel one company to *receive* cars from another, and to haul them as a continuous shipment. And in this same case before Mr. Justice Field a provision of the defendant's charter was also relied on, which in effect provided that it should "form running connections" with other railroads connecting therewith. The court held that this language did not justify the demand made, and in that connection said:

> "Whenever an intention has been manifested, in the "creation of railway charters, that a connecting company "shall have the power to run its cars over the lines of "another, or to require one company to haul over its lines "the cars of another, such intention has been expressed in "unequivocal terms, such as is found in the constitutions "or statutes of several of the States, respecting railway "companies, which is substantially in these terms: 'And "they shall receive and transport each other's passengers, "tonnage and cars, loaded or empty, without delay or dis-"crimination.'" (P. 475.)

This decision by Mr. Justice Field is probably rendered even more striking by the fact that Judge Deady, who sat with him, dissented from his conclusions, both as to the requirements of the Interstate Commerce Act and also as to the requirements of the defendant's charter. But the case was appealed to the Circuit Court of Appeals for the Ninth

Circuit, where the judgment entered pursuant to Mr. Justice Field's opinion was affirmed in an opinion delivered by Judge McKenna, now Mr. Justice McKenna, of this court, in Oregon Short Line, etc., R. Co. vs. Northern Pacific R. Co., 61 Fed. 158.

In this latter opinion the Circuit Court of Appeals quotes and expressly approves the language of Mr. Justice Field, heretofore quoted, to the effect that wherever legislatures have intended to require an interchange of cars they have said so in unmistakable terms. And the court also notes the opinion expressed by the Interstate Commerce Commission in Little Rock, etc., R. Co. vs. East Tennessee, etc., R. Co., 3 Interstate Commerce Commission Reports, 1, to the effect that the Interstate Commerce Act was intended to effect the same results as were intended by the English act, but had simply *omitted the machinery to accomplish it.* Referring to this, Judge McKenna says:

> "It would seem like better reasoning to assume that, if "Congress had intended the same results as the English "act, having it and its history and construction before "them, it would have adopted its language and machinery, "and made the result certain." (61 Fed. 161.)

Again the question came, with the same result, before the Circuit Court of Appeals of the Eight Circuit in a striking case, to wit, Little Rock, etc., R. Co. vs. St. Louis Southwestern, etc., R. Co., 63 Fed. Rep. 775, wherein the opinion was delivered by Judge Thayer, in September of 1894. In this case the Little Rock & Memphis R. Co. was complaining of several other railroad companies for discrimination against it. Counsel for complainant in the case at bar refer to that case as if it had mainly to do with the question of the right

of a carrier to demand *prepayment of freight.* But this is incorrect. It did involve that question, but this was by no means the most important question involved. As against the St. Louis Southwestern, etc., R. Co. the complainant's bill alleged "that it required all freight to be *rebilled* and *reloaded*, and all passengers to purchase new tickets, at the town of Brinkley, while at the same time it accepted through tickets and through bills of lading, and *cars loaded in carload lots*, that came over the line of the St. Louis, Iron Mountain, etc., R. Co." And again, as against the Little Rock & Fort Smith Railroad Company, the complainant's bill alleged "that it exchanged freight with the St. Louis, Iron Mountain & Southern Railway Company upon an arrangement for through billing, and *in the cars in which it was shipped*, when shipped in carload lots, and that it refused at the same time to exchange freight with the Little Rock & Memphis Railway Company, except upon local rates, *and that it refused to accept from or deliver to the latter railroad any loaded cars.*" The foregoing statements as to the allegations of the bill are quoted from Judge Thayer's statement of the facts in the case. These facts were admitted by demurrers to the bill. The Circuit Court sustained the demurrers and dismissed the bill; and the Circuit Court of Appeals affirmed the judgment; so that there was not only a refusal to grant the entire relief demanded by the complainant, but a refusal to grant any part of it.

On the subject of the interchange of cars, traffic, etc., the court said:

> "Before discussing the precise issue which arises upon "this record, it will be well to restate one or two proposi- "tions that are supported by high authority as well as "persuasive reasons, and which do not seem to be

"seriously controverted even by the complainant's "counsel. In the first place the interstate commerce law "does not require an interstate carrier to treat all other "connecting carriers in precisely the same manner, *with-* "*out reference to its own interests. Some play is given* "*by the act to self-interest.* . . . In the second place "it has been held that neither by the common law, nor "by the interstate commerce law, have the national "courts been vested with jurisdiction to compel inter- "state carriers to enter into arrangements or agreements "with each other for the *through billing of freight*, and "for joint through rates. Agreements of this nature, it is "said, under existing laws, *depend upon the voluntary* "*action of the parties and can not be enforced by judicial* "*proceedings without additional legislation.*" (P. 778.)

And again, in the latter part of the opinion, returning to this same subject, the court said:

"Furthermore, it is the settled construction of the act, "as we have before remarked, that it does not make it "obligatory upon connecting carriers to enter into traffic "arrangements for through billing and rating, either as "to passenger or freight traffic. This conclusion has "been reached by all of the tribunals who have had "occasion to consider the subject, and it is based on the "fact that, in enacting the commerce act, Congress did not "see fit to adopt that provision of the English Railway "and Canal Traffic Act, passed in 1873, which expressly "empowered the English commissioners to compel con- "necting carriers to put in force arrangements for through "billing and through rating, when they deemed it to the "interest of the public that such arrangements should be

"made. Little Rock & M. R. Co. vs. East Tennessee, etc.,
"R. Co., 3 Interst. Commerce Com. Rep. 1, 9, 10; K. &
"I. Bridge Co. vs. L. & N. R. Co., 37 Fed. 567, 630, 631.
"See, also, the second annual report of the Interstate
"Commerce Commission (2 Interst. Commerce Com. R.
"510, 511)." (P. 781.)

The question of whether a railroad company is willing to receive cars from another company, or to give up its own cars to another company, are questions largely depending upon the particular conditions existing at particular times and especially upon the question of car supply. Railroad companies sometimes are willing to let their cars go to other companies and get the mileage ordinarily paid for the use of the same, whereas, at other times they prefer to keep their cars on their own roads. On the other hand, they are sometimes willing to accept and use the cars of other companies and pay for them, while at other times they prefer to use their own cars and not use those of another company. These are matters which the law has left to the railroad companies to arrange among themselves according to their business needs and the judgment of their managers. This matter of *exchange of cars* is classed by Judge Jackson in the case of K. & I. Bridge Co. vs. L. & N., 37 Fed. 629, in the same category with arrangements for *joint tariffs* and for *common use of depots*, etc. In this case, he quotes with approval the following language of the Interstate Commerce Commission in Railroad Company vs. Railroad Company, 1 Interstate Commerce Reports, 94, with reference to through tickets, to wit:

"Such tickets very evidently are a great convenience
"to travelers, and perhaps to connecting roads; but they

"are a part of the voluntary arrangements for business "purposes, like *joint tariffs*, *interchange of cars*, and *com-* "*mon use of depots* . . . If companies can agree upon "their tariffs, the form of their tickets and how they shall "be sold, they have the right to do so, and by such "agreement become interstate carriers; but if they can "not agree, the act does not undertake to coerce them to "do business together upon terms that may be justly "objectionable or injurious." (37 Fed. 629.)

And finally in the case at bar, decided in May, 1902, the Circuit Court of Appeals of the Sixth Circuit, in an opinion by Judge Day, now Mr. Justice Day, says:

"No arrangement exists with the Southern Railroad "for the transportation and delivery of cars of live stock "to the Central Stock Yards, if that can be assumed to "be a station on the line of the Southern Railway, nor "do we think a court of equity has the power to make "one and supervise its execution, nor has this right been "conferred upon the courts by the Interstate Commerce "Act. This doctrine is so thoroughly established as to "require no more than the citation of the authorities to "support it." (Citing authorities.) 118 Fed. 118.

Considering the striking difference between the English act and the American Interstate Commerce Act; considering the fact that this difference was pointed out the year after the passage of the Interstate Commerce Act, and a specific recommendation made by the commission for the amendment of that act, so as to require the establishment of through routes and the interchange of traffic, and so as to give the commission the authority to enforce the requirement; and

considering the fact that Congress did not see fit to adopt the amendment; and considering the opinions of the eminent courts and judges heretofore cited upon the question involved, and calling express attention to the failure of Congress to act upon the matter; and considering that down to this day, sixteen years after the original passage of the act, and after all of these many decisions upon it, Congress has still refused to change it in the manner under consideration, we say, keeping in mind all these considerations, it seems to us that the question is practically concluded; and that it must be adopted as the settled law that, neither by the common law nor by the Interstate Commerce Act, have courts of equity any power to compel either the establishment of a through route, with interchange of cars between connecting lines, or the establishment of a through rate; but that these are matters of mutual voluntary agreement between the carriers.

As heretofore suggested, counsel for complainant have argued this case as if the exchange of carload lots of live stock between the L. & N. R. Co. and the Southern Railway Company would not require any character of arrangement or agreement between the two companies. But this is manifestly an incorrect assumption. These cars are of great value, and the live stock in them is of great value. A car containing live stock can not be cast off to one side by a railroad company and left to be picked up at will by another company. There must be some arrangement for the exchange of the cars between the two companies; there must be some agreement as to how the company which owns the car is to be *compensated for the use of the car while out of its possession* and in use by another; there must be some provision as to *how long the car is to be kept*, and as to who is to be responsible for it if it is lost. There must likewise, in the orderly conduct of business of this kind, be some arrange-

ment or agreement for the adjustment and apportionment of losses where, as very frequently happens, stock is injured during transit, and nobody can tell where it was injured, whether on the one line or on the other. These and many other matters are subjects which in the practical operation of the business must be covered by contract, by mutual arrangement and understanding between the parties involved. And just what that arrangement shall be, what agreement they will make, under what circumstances and conditions they will exchange cars, are all matters of voluntary arrangement, which the Interstate Commerce Act does not attempt to control.

As said by Judge Thayer in the Little Rock & Memphis case, heretofore referred to:

> "Another necessary result of the doctrine contended "for by complainant is that it deprives railroad carrier's "in a great measure of the management and control of "their *own property*, by destroying their right to deter- "mine for themselves what contracts and traffic arrange- "ments with connecting carriers are desirable, and what "are undesirable. There ought to be a *clear authority* "found in the statutes for depriving a carrier of this "important right, before the authority is exercised, for, "when questions of that nature have to be solved, *a great* "*variety of complex considerations will present themselves*, "*some of which can neither be foreseen nor stated.*" (63 Fed. 779.)

And in this same connection we may quote the language of Mr. Justice Brewer in Chicago, etc., R. Co. vs. Osborne, 52 Fed. Rep. 912, where, speaking for the Circuit Court of Appeals for the Eighth Circuit, he said:

"While it is the duty of the courts to see that the pro-
"visions established by Congress are not frittered away on
"technical or trifling grounds, yet it is also equally their
"duty to see that such legislation is not carried beyond
"its *clear scope*, and that the owners of private capital
"invested in the business of transportation *be not deprived*
"*of their liberty of contract and right of control* any
"further than the lawmaking power has intended that
"they should be." (Page 914.)

The Louisville & Nashville Railroad Company may be willing to make arrangements with the Southern Railway by which *under some conditions* it will exchange cars of live stock with it. It may be willing, for example, when live stock is simply passing through the city of Louisville, destined for a distant non-competitive point, to transfer the same to the Southern Railway. But on the other hand, it may be wholly unwilling to go to the trouble and expense and inconvenience of transferring the same to the Southern Railway simply for delivery right here in the City of Louisville to the depot of the latter company, when the Louisville & Nashville Railroad Company has a live stock depot of its own in that city, and when it is manifestly to its interest, from every consideration, that live stock brought by it to the city of Louisville should be delivered *at its own stock depot*, whence, if it should leave the city of Louisville again it will likely go out over the lines of the Louisville & Nashville Railroad; rather than be delivered to the *live stock depot of the Southern Railway*, whence, if it leaves the city of Louisville again, it is likely to go over the lines of that company or some other company than the Louisville & Nashville Railroad Company.

We submit, therefore, that neither by the common law nor the Interstate Commerce Act is the Louisville & Nash-

ville Railroad Company required to accept live stock destined to a point beyond its line, or to deliver its cars containing such stock to a connecting carrier, to be transported over the line of the latter.

V.

The State Constitution—Power to Regulate Interstate Commerce.

But counsel for appellant insist that this whole matter is regulated by the Constitution of Kentucky, although it will be observed that the bill of complaint herein expressly confines the complaint *exclusively to interstate shipments of stock;* that although neither the common law obligations of the railroad company nor the provisions of the Federal Interstate Commerce Act may require the defendant to conduct its interstate commerce as complainant desires it to be conducted, yet the State of Kentucky has come to the assistance of Congress and has adopted a constitutional provision "in aid of commerce," and which is as follows:

> "All railroad, transfer, belt lines and railway bridge "companies organized under the laws of Kentucky, or "operating, maintaining or controlling any railroad, "transfer, belt lines or bridges, or doing a railway busi- "ness in this State, shall receive, transfer, deliver and "switch empty or loaded cars, and shall move, transport, "receive, load or unload all the freight in carloads "or less quantities, coming to or going from any "railroad, transfer, belt line, bridge or siding thereon, "with equal promptness and despatch, and without any "discrimination as to charges, preference, drawback or

"rebate in favor of any person, corporation, consignee or "consignor, in any matter as to payment, transportation, "handling or delivery; and shall so receive, deliver, trans- "fer and transport all freight as above set forth, from and "to any point where there is a physical connection "between the tracks of said companies. But this section "shall not be construed as requiring any such common "carrier to allow the use of its tracks for the trains of "another engaged in like business." (Kentucky Constitution, Section 213; Kentucky Statutes, page 148.)

As to what may be the proper construction of this section of the Kentucky Constitution as applicable to business within the State of Kentucky, we will not now stop to inquire, for we think it beyond reasonable doubt that it can have no force as applicable to that class of business to which the bill of complaint in this suit is in express terms confined, to wit, interstate shipments of cattle, or, in other words, interstate commerce.

The theory of the counsel for appellant, as said above, seems to be that the several States can regulate interstate commerce by the adoption of provisions covering such points in the management of this business as they may think are not properly covered by the Federal act governing this subject. In other words, their theory seems to be that *although Congress refused to adopt the recommendation of the Interstate Commerce Commission heretofore mentioned, and refused to amend Section 3 of the Interstate Commerce Act, as recommended by the commission, yet the State of Kentucky has power and authority to come to the relief of the public and provide that regulation of interstate commerce which the Congress of the United States has failed, and, in effect, refused, to provide.* It seems to us that the very statement of this proposition is its answer.

A great deal has been written on the subject of how far the States may make laws which *affect* interstate commerce. It has always seemed to us that this subject is more clearly treated in the case of County of Mobile vs. Kimble, 102 U. S. 691, than in any other case. There the question was as to the validity of an act of Alabama providing for the improvement of the harbor of Mobile. It was insisted that this was used in interstate commerce, and that this act in effect, therefore, regulated interstate commerce. Speaking on this subject of the power of Congress over interstate commerce, the court, through Mr. Justice Field, said:

"That power is indeed without limitation. It autho-
"rizes Congress to prescribe the conditions upon which
"commerce, in all its forms, shall be conducted between
"our citizens and the citizens or subjects of other coun-
"tries, and between the citizens of the several States,
"and to adopt measures to promote its growth and insure
"its safety. And as commerce embraces navigation, the
"improvement of harbors and bays along our coast and
"of navigable rivers within the States connected with
"them falls within the power. The subjects indeed upon
"which Congress can act under this power are of infinite
"variety, requiring for their successful management
"different plans or modes of treatment. Some of them
"are national in their character and admit and require
"uniformity of regulation, affecting alike all the States;
"others are local, or are mere aids to commerce, and can
"only be properly regulated by provisions adapted to their
"special circumstances and localities. Of the former
"class may be mentioned all that portion of commerce
"with foreign countries or between the States which con-
"sists in the transportation, purchase, sale and exchange

"of commodities. Here there can of necessity be only one "system or plan of regulations, and that Congress alone "can prescribe. Its non-action in such cases with respect "to any particular commodity or mode of transportation "is a decision of its purpose that the commerce in that "commodity or by that means of transportation shall be "free. (Pages 696, 697.) . . .

"Of the class of subjects local in their nature, or "intended as mere aids to commerce, which are best "provided for by special regulations, may be mentioned "harbor pilotage, buoys, and beacons to guide mariners "to the proper channel in which to direct their vessels.

"All rules to govern harbor pilotage must depend in "a great degree upon the peculiarities of the ports where "they are to be enforced. It has been found by experi- "ence that skill and efficiency on the part of local pilots "is best secured by leaving this subject principally to the "control of the States. Their authority to act upon the "matter and regulate the whole subject, in the absence "of legislation by Congress, has been recognized by this "court in repeated instances. (Pages 697, 698.) . . .

"Perhaps some of the divergence of views upon this "question among former judges may have arisen from "not always bearing in mind *the distinction between com-* "*merce as strictly defined, and its local aids or instru-* "*ments, or measures taken for its improvement. Com-* "*merce with foreign countries and among the States,* "*strictly considered, consists in intercourse and traffic,* "*including in these terms navigation and the trans-* "*portation and transit of persons and property, as well* "*as the purchase, sale and exchange of commodities.* "*For the regulation of commerce as thus defined there* "*can be only one system of rules applicable alike to*

"*the whole country; and the authority which can act*
"*for the whole country can alone adopt such a system.*
"*Action upon it by separate States is not, therefore,*
"*permissible.*" (Page 702.)

The distinction here drawn is very clear. It is the distinction between the mere *instruments* by which commerce is conducted and, on the other hand, the *commerce itself.* The harbor of Mobile was undoubtedly an instrument used in the conduct of interstate commerce; and therefore a law providing for its improvement did *affect* interstate commerce. But it was not interstate commerce itself. Now the court says that the State has power to make regulations for the improvement of the instruments and facilities for the conduct of commerce (when said instruments or facilities are within the jurisdiction of the State), but that they have not the power to regulate the handling of the commerce itself, as strictly defined. And this commerce, as strictly defined, includes, says the court, "navigation and the transportation and transit of persons and property."

Exactly within the principles of the foregoing cases comes the case of Wisconsin, etc., Railroad Co. vs. Jacobson, 179 U. S. 287, which is greatly relied upon by counsel for appellant in the case at bar. The State of Minnesota had adopted a statute requiring in effect railroad companies, where their lines crossed each other, to put in connecting tracks so that cars might run from one line to the other. It also provided for the establishment of joint rates over the connecting lines, and provided that, if the railroad companies did not establish such rates, the Railroad Commission might establish them. The Railroad Commission made an order requiring two railroad companies, whose lines crossed each other, to put in a connecting track of the character described

in the act. One of the railroad companies resisted this exercise of authority by the commission, and the Supreme Court of the State upheld the validity of the act and the action of the commission. The case was carried by writ of error to this court, where the judgment of the State court was affirmed in an opinion by Mr. Justice Peckham. But in this opinion the court is very careful to say that nothing is involved in the case except the power of the State to require the establishment of these connecting facilities at the point of crossing. After saying that the railroad company insisted that this act was a regulation of interstate commerce, the court says:

"The judgment in this case, however, neither regulates "nor interferes with that commerce, nor does that part "of the statute upon which the judgment is founded. "Whether any portion of the statute does regulate such "commerce is beside the question, and it is not necessary "to here decide. To provide at the place of intersection "of these two railroad companies at Hanley Falls ample "facilities by track connections for transferring any and "all cars used in the regular business of the respective "lines of road over the lines or tracks of one of said "companies to those of the other, and to provide at such "place of intersection equal and reasonable facilities for "the interchange of cars and traffic between their respect-"ive lines, and for the receiving and forwarding and "delivering of property and cars to and from their "respective lines, as provided for by this judgment, would "plainly afford facilities to interstate commerce, if there "were any, and would in no wise regulate interstate "commerce within the meaning of the Constitution. "That is all that has been done by the judgment in

"review. A State may furnish such facilities or direct "them to be furnished by persons or corporations within "its limits without violating the Federal Constitution. "But the Supreme Court of the State, in the opinion "delivered therein, said that there was ample evidence in "the case of the necessity for such track connection result- "ing from the benefit which would accrue to exclusively "State commerce, when considered alone, to justify the "ordering of the connection in question.

"What is said in the statute in relation to the estab- "lishment of joint through rates for the transportation of "freight between points on the respective lines of these "roads within the State, and the manner of enforcing the "establishment of such rates, in case of the omission so "to do by the companies, and as to any unjust or unrea- "sonable charge for the transportation of freight cars, are "all matters which do not arise under this judgment and "may never arise as a result of its enforcement. The "tracks being connected, the making of joint rates is a "matter primarily for the companies interested, and it "may be that they will agree upon them and thus do "away with the necessity of any resort to the courts. "The objection that there is any violation of the Inter- "state Commerce clause of the Constitution is, we think, "clearly untenable." (295.)

In other words, this Jacobson case simply involved the right of the State of Minnesota to require these railroad companies to put in a connection between their two roads where they crossed each other in the State, so that a car might be transferred from one to the other at the point of crossing, and to provide facilities for making such transfer. This was precisely analogous to the statute of Alabama for

the improvement of the harbor of Mobile. In each instance the act was for the improvement of mere facilities for the handling of commerce, and while in this way it affected interstate commerce, it did not regulate the commerce itself.

Now in the case at bar there is no attempt to improve the mere facilities for the conduct of commerce by requiring connection to be put in between the railroads of the Louisville & Nashville and the Southern Railway Company, where they cross each other. It is alleged, and it is a fact, that these connections already exist. There is no attempt here to improve the nature or character of the cars used in the handling of this commerce, or of the roadbed over which it runs, or anything at all of that character. The attempt is *to seize upon the very commerce itself*, as strictly defined in the case of County of Mobile vs. Kimble, and to require that the railroad companies handling such commerce shall transfer it or deliver it to certain persons or in a certain manner, and actually to prescribe how bills of lading shall be issued in Tennessee and Alabama for freight to be delivered in Kentucky. The attempt is to make a rule governing the transportation of this interstate freight, for it must be remembered that this case is confined exclusively to interstate freight; and this is precisely the thing which the Supreme Court in the County of Mobile vs. Kimble says the States can not do.

Counsel for complainant in the portion of their brief devoted to the discussion of the question as to whether or not Section 213 of the Kentucky Constitution is an attempt to regulate interstate commerce, quote the language of this court in the Jacobsen case, which we have just been considering, as found on pages 296 and 297 of the report of that case, where the court refers to the *fairness* and *reasonableness* of the regulation as being matters of appro-

priate consideration. But if the opinion be read, it will immediately be seen that where the court uses this language it is not discussing any question of interstate commerce, or of the validity of the act there attacked on the ground of its being a regulation of interstate commerce, but is defending the validity of the act as against a claim that it deprived the defendant of its property *without due process of law*, in which discussion of course it was very appropriate to consider the reasonableness and fairness of the procedure of which the defendant was complaining.

Counsel also in their brief, in the portion devoted to the discussion of the interstate commerce feature, quote fully two pages from the opinion of this court in the case of Minneapolis, etc., R. R. Co. vs. Minnesota, 186 U. S. 257, which case arose out of the same act of Minnesota which was involved in the Jacobson case. But when we turn to the court's opinion in 186 U. S., we do not find any discussion at all of the question as to whether the act was or was not an attempt to regulate interstate commerce. No such question seems to have been raised, so far as the report of the case shows. But it was insisted, in the language of this court, that the act was unconstitutional because "it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable and unprofitable contracts." (Page 260.)

This exact question as to whether or not a State statute could be held to cover the subject of interchange of traffic and the prepayment of freight, etc., upon interstate commerce was decided by the United States Circuit Court of Appeals for the Fifth Circuit in Gulf, etc., R. Co. vs. Miami Steamship Co., 86 Fed. 407, where the railroad company had made certain arrangements with one steamship company to deliver freight to it, without requiring

the prepayment of freight charges, and also to issue through bills of lading, etc., but had refused to make similar arrangements with another steamship company. A suit was brought to prevent this alleged discrimination, and reliance was placed not only upon the Federal laws, but upon the statutes of Texas, which forbade such a discrimination in general terms, without expressly mentioning either State commerce or interstate commerce, but simply, as just suggested, in general terms. On the subject of the applicability of this State law the court said:

> "Counsel for appellee also cite Articles 4536, 4537 and "4539 of the Revised Statutes of Texas of 1895. It is "shown by the appellee that all the traffic which com- "plainant is engaged in is interstate or foreign com- "merce. Such commerce is subject to exclusive regula- "tion by the national government. This power to regu- "late such commerce is vested in Congress, and is not a "dormant power, but has been put into full exercise by "the Act of February 4, 1887. Hence the article of the "Texas Statutes cited can have no application to such "commerce as the plaintiff is engaged in conducting. "There is nothing in the language of the Texas Statute "that indicates a purpose upon the part of the legislature "that the articles quoted should apply to interstate or "foreign commerce." (Page 420.)

Now, if it be said that the State has the power to regulate the handling of this interstate commerce at Louisville, because Louisville is its destination, the response is that the *delivery* of the freight at the point of destination is as much a part of the commerce as the handling of it upon any other part of the line of transportation. And this has been

expressly determined by this court in the case of Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., where the ferry company was doing business in transporting persons and freight from New Jersey to Pennsylvania, across the Delaware River. An attempt was made to levy a tax upon the business of the ferry company, and it was insisted, in support of the tax, which point was maintained by the Supreme Court of Pennsylvania, that a part of its business was certainly done exclusively in Pennsylvania, to wit, the *landing at the wharf* in Pennsylvania. On this subject this court said:

> "As to the first reason thus expressed, it may be "answered that the business of landing and receiving "passengers and freight at the wharf in Philadelphia "is a necessary incident, indeed is a part, of their trans- "portation across the Delaware River from New Jersey. "Without it that transportation would be impossible. "*Transportation implies the taking up of persons or prop-* "*erty at some point and putting them down at another.*" (Page 203.)

Again in the case of Covington Stockyards Co. vs. Keith 139 U. S. 128, heretofore considered at length, where the court was discussing the question of the relative rights and duties of the parties as to the delivery of freight, the court said:

> "The transportation of live stock begins with their "delivery to the carrier to be loaded upon its cars, and "ends only after the stock is unloaded and delivered, or "offered to be delivered, to the consignee, if to be found, "at such place as admits of their being safely taken into "possession." (Page 136.)

Again, in the case of Fielder vs. Missouri, etc., Railway Co., 42 S. W. 362, the Civil Court of Appeals of Texas reiterates the same proposition as to the handling at terminals. The syllabus of the case is as follows:

"The power of Congress to regulate interstate com-
"merce extends to the necessary switching of cars and
"delivery at terminal points. And an action to recover
"penalties imposed by State statute upon carriers for dis-
"crimination between individuals in regard to terminal
"facilities can not be maintained with respect to freight
"brought from another State, as that matter is covered
"by Federal statute."

And in the course of the court's opinion it says:

"It is as much necessary to the interest of interstate
"commerce and the uniformity of rule that should apply
"to transportation of that character of commerce, which
"is one of the objects intended to be accomplished by
"reserving this power solely to Congress, that it should
"retain control and dominion over the shipments at the
"beginning and terminal points, as well as during the
"actual transportation of the commerce." (Page 364.)

Furthermore, that Congress understood terminal service to be a part of interstate commerce is shown by the amendment to Section 6 of the Interstate Commerce Act adopted March 2, 1889, which expressly provides for the publication of terminal charges, saying:

"The schedules printed as aforesaid by any such com-
"mon carrier shall plainly state the places upon its rail-

"road between which property and passengers will be "carried, and shall contain the classification of freight "enforced, *and shall also state separately the terminal* "*charges*, and any rules or regulations which in any wise "change, affect or determine any part of the aggregate "of such aforesaid rates and fares and charges." (Sup. to U. S. Rev. Stats., Vol. 1, p. 684.)

The case of Council Bluffs vs. Kansas, etc., R. Co., 45 Iowa, 338, 24 Am. Reps. 773, also involves a decision of the question under consideration. The syllabus of the case is very brief, showing but one point involved, and is as follows:

"A State statute required railroad companies connect- "ing with railroads outside the State to transfer freight "and passengers at a point within the State. Held, void "as in conflict with the Constitution of the United States, "giving to Congress the power to regulate commerce "among the States."

Evidently the statute involved in the Iowa case was passed pursuant to the policy of requiring railroad companies to break bulk. In one sense it is just the converse of the Kentucky Constitutional provision as interpreted by complainant in the case at bar.

The foregoing authorities seem to us to show conclusively that Section 213 of the Constitution of Kentucky, if applied to live stock coming from points outside of the State to points within the State, would be a regulation of interstate commerce "as strictly defined;" that it would be a provision not merely for the improvement of the facilities by which commerce is conducted, but a regulation of the commerce itself; and that as thus construed it would be contrary to the Constitution of the United States.

Counsel for appellant refer to certain authorities in support of their proposition as to the power of Kentucky to regulate this commerce.

They refer to the case of Lake Shore Railroad Co. vs. Ohio, 173 U. S. 283. That case involved the validity of a statute of Ohio which required railroad companies to stop three passenger trains a day at all stations having as many as three thousand inhabitants. *It will be observed that it did not make any attempt to regulate the handling, transportation or delivery of either passengers or freight that were interstate in their character.* It left the railroad company to run as many interstate trains a day as it pleased, and to stop them where it pleased, or not stop them at all. It simply provided that three trains a day should be stopped at towns of the size mentioned. If the railroad company stopped these three trains a day, but felt that it was proper or desirable to run interstate trains which did not stop at so many places, it was at perfect liberty to run them. But, as suggested above, there was absolutely no attempt to provide how these interstate passengers should be handled. Accordingly the court held that this was not a regulation of interstate commerce, but was simply a provision by the State for the convenience of its citizens requiring a certain number of trains a day to be stopped at towns of a certain size.

No such question as was involved in the Lake Shore case is involved in the case at bar. There is no attempt by the State of Kentucky to provide how many stock trains a day shall be run, or where they shall be stopped. But the attempt here is to regulate, as has been heretofore said, the interstate commerce itself, to require that live stock offered to the Louisville & Nashville Railroad Company in the State of Tennessee for transportation by a continuous

shipment to a point in the State of Kentucky, shall be received upon certain conditions as to marking or as to the form of the bill of lading to be issued for them, and shall be delivered here at Louisville, in the State of Kentucky, to a certain connecting carrier for transportation to a certain destination. We hardly see how it is open to reasonable question that this is an attempt to make a rule for the governing of this interstate commerce, or, in other words, that it is, in the strictest sense, a regulation of interstate commerce.

A reference is also made to Western Union Telegraph Company vs. James, 162 U. S. 650. This case involved a Georgia statute providing a penalty for failure to deliver telegrams within a certain radius. There was a failure to deliver a certain interstate telegram, and the penalty was imposed. The question involved was the validity of that statute. The court held it to be valid. But in so doing it expressly held that the duty of delivering the telegram *did not rest upon that statute;* that the obligation to deliver the telegram was a part of the common law duty of the telegraph company; and that the statute simply fixed a penalty for failure to perform a common law duty, and therefore could not be called a regulation of interstate commerce. Speaking on this subject, the court said:

"It is the duty of a telegraph company which receives "a message for transmission, directed to an individual at "one of its stations, to deliver that message to the per- "son to whom it is addressed, with reasonable diligence "and in good faith. That is a part of its contract, "implied by taking the message and receiving payment "therefor. The statute in question is of a nature that is "in aid of the performance of a duty of the company

"*that would exist in the absence of any such statute*, and "it is in no wise obstructive of its duty as a telegraph "company. It imposes a penalty for the purpose of "enforcing this general duty of the company. The direc- "tion that the delivery of the message shall be made with "impartiality and in good faith and with due diligence "*is not an addition to the duty which it would owe in the* "*absence of such a statute.* Can it be said that the impo- "sition of a penalty for the violation of a duty which "the company owed by the general law of the land is a "regulation of or an obstruction to interstate commerce "within the meaning of that clause of the Federal Con- "stitution under discussion? We think not." (Page 660.)

We might assume for illustration a somewhat similar case. Suppose Kentucky should pass an act to the effect that where a railroad company injures a passenger by gross or willful negligence, it shall be liable to a penalty of $100. And suppose such a company should, after the adoption of such statute, be guilty of gross or willful negligence, by which some one is injured, and suit should be brought for the penalty. Manifestly the railroad company could not defend such an action by stating that the particular passenger injured had come from Tennessee and was an interstate passenger. The obligation of the company to carry this man safely did not rest upon that statute. It was a common law obligation, and the statute merely imposed a penalty for the violation of that common law obligation which the company owed to that passenger, whether he was an intrastate or an interstate passenger. Such a statute would not in any wise attempt to regulate how the passenger shonld be carried. That is a matter regulated by

the common law, and such a statute would add no obligation to those which the common law imposed. It would merely, as said above, fix a penalty for the violation of that common law obligation, and would impose no new rule for the conduct of such transportation. This is exactly the principle involved in Western Union Telegraph Co. vs. James, *supra*.

But what are the facts in the case at bar? There is here no attempt simply to impose a penalty for the violation of a common law obligation. We have already shown that there was no common law obligation upon the defendant to do business in the manner in which the complainant desires. There is an attempt here, according to complainant's construction of the Kentucky Constitution, to impose a new obligation upon the railroad company, an attempt to prescribe a rule for the conduct of interstate transportation, interstate commerce, which the common law did not prescribe, and which the Federal Interstate Commerce Act does not prescribe. And if this be the true construction of the constitutional provision, it is to that extent void.

In conclusion, therefore, upon this point, we submit that the provisions of the Constitution of Kentucky have absolutely no application to the facts involved in the case at bar; that the State of Kentucky has no power or authority to aid interstate commerce by establishing a rule for its government which the Congress of the United States, although legislating exclusively on the subject of interstate commerce, has not only failed, but has in effect refused, to adopt, after having had the matter pointedly called to its attention.

VI.

Due Process of Law.

In so far as this case involves a demand that the Louisville & Nashville Railroad Company *deliver its cars to the Southern Railway Company*, for use by the latter company in transporting freight to points on the line of the latter company, we submit that there is no power in any tribunal, State or Federal, legislative or judicial, to require this. The cars of a railroad company are its property. They are very valuable property, costing a great deal of money in their original acquisition, and whose use is a most valuable use so long as the cars exist. The railroad company which is well provided with good rolling stock has an immense advantage over one that is not; and one of the problems which a railroad manager has constantly to confront is to keep proper rolling stock upon his road to accommodate its business. And we submit, as said above, that there is no power in any tribunal, under our republican form of government, to take from a railroad company its property consisting in its rolling stock, except by virtue of the power of eminent domain after proper proceedings had for that purpose; and that there is no power anywhere existing to order one railroad company to deliver up its property of this character to another railroad company for use by the latter company, thus taking property out of the possession of its owner and putting it under the control of another, without the owner's consent.

We have already seen, so far as the Federal act to regulate interstate commerce is concerned, that it does not attempt to require the interchange of cars between railroad companies; hence, of course, no question could ever have been decided as

to the power of Congress to require one railroad company to deliver its cars to another.

It is insisted, however, by counsel for appellant that this question has been decided by certain State courts, and that their decisions are reasonable and sound. Let us see if this is true.

Peoria & P. Q. R. Co. vs. Chicago, R. I. & P. R. Co., 109 Ill. 135, 50 Am. Rep. 605, is relied on by counsel, and is likewise relied on in later cases cited by counsel. An examination of this case shows that it does not involve the question of the power to require one railroad company to deliver its own cars to another company. It simply involved the question of the duty of one company to *receive and haul* the cars of another company. And the court based its conclusion upon the proposition that a railroad company in Illinois is a common carrier of "cars," as well as of freight, and therefore that, when cars were offered to it to be hauled, it was under as much obligation to haul these cars as it was to haul freight in cars. This simple statement shows that no question was involved as to the right to require a railroad company to deliver up its cars into the possession of another company.

Burlington C. R. & N. R. Co. vs. Dey, 82 Iowa, 312 (12 L. R. A. 436; 31 Am. St. Rep. 477), is cited upon this subject, and in turn cites for its authority the Illinois case just mentioned. It is not altogether plain as to exactly what the court considered to be involved in that case, although language is used in the opinion which is strongly relied on in the case at bar. Speaking of the case before it, the court, in the majority opinion, says:

"The plaintiff does not allege any other ground of "action than the threatened establishing of '*through joint* "*rates.*' No other objections to the statutes in question, "pertaining to railroads and rates and joint rates, are

"made in the petition; none other are before us for con-
"sideration. It will be here seen that the statutes under
"consideration in no way affect the duty, obligation or
"rights of the plaintiff as a common carrier, further
"than is done by the regulation of rates of charges.
"The law relating to the receipts and delivery of freight
"to connecting lines, and the obligations and rights of
"consignors and consignees and of the railroads, growing
"out of the relations existing when such connecting
"lines exist, are not modified, restricted or in any way
"affected by these statutes." (Page 331.)

But notwithstanding this statement by the court as to what was involved, it does subsequently say in its opinion that defendant objects to the statutes, among other grounds, on the ground "that one company shall surrender its cars to the possession of another, or unload the contents without compensation." (Page 334.) And in answering this contention the court, among other things, says the following:

"7. The course of business of railroad companies,
"originating in the wants and demand of commerce,
"requires the cars of one company to be delivered to
"another for transportation . . . The fact that the trans-
"fer of cars from one company to another, for the trans-
"portation of property over more than one railroad, with-
"out breaking bulk, has been practiced so long as to
"be recognized as of the course of business, *of which*
"*we will take judicial notice* (Peoria & P. R. Co. vs.
"Chicago, etc., R. Co., 109 Ill. 135), is a complete answer
"to the complaints made in the objections under consid-
"eration. Surely a course of business so long pursued,
"and so extensively prevailing, and demanded by the
"commerce of this country, can not, when recognized and

"required by statute, become so objectionable in princi-
"ple, so oppressive in operation, as to require the statute
"to be declared unconstitutional. A railroad company,
"as a common carrier, is required to receive and trans-
"port freight offered to it for transportation. The rea-
"sons upon which this rule is founded impose upon it
"the obligation to haul cars of other companies brought
"to it for the transportation over its own road. Peoria
"& P. R. Co. vs. Chicago, etc., R. Co." (Page 335.)

From this conclusion and opinion two of the judges of the Supreme Court of Iowa dissented on the express ground, as stated in a dissenting opinion, that the statute was unconstitutional in requiring a railroad company to deliver its cars to another company.

Before commenting on this case, we will notice another case cited and relied on by counsel for appellant in the same line, to wit, Jacobson vs. Wisconsin, etc., R. Co., 71 Minn. 519 (70 Am. St. Rep. 358). This is the case heretofore referred to, which was carried to this court where it is reported under the style of Wisconsin, etc., R. Co. vs. Jacobson, 179 U. S. 287, and in which, as we have already shown, this Court held in effect that the only question before it was the question as to the right of the State to require the railroads to *provide facilities* at the point of crossing for the interchange of traffic. This Court in its opinion does not discuss the question of the right of a State to require one railroad company to deliver its cars to another. And it appears from the opinion of the *State* court that this question is only discussed incidentally, the language of the court being as follows:

"It is contended that, even if the connections were
"made, neither railway company could be compelled to

"deliver its loaded cars to the other, to be carried with "their contents to their destination over the road of such "other; that to compel appellant to deliver up its cars "to be carried away from the line of its road to distant "points would be in violation of its charter contract, and "unconstitutional; that for this reason it is useless to "compel the making of the connection in question, and "therefore the legislative act fails of its purpose, and is "unconstitutional and void.

"Such interchange of cars between railroads is com- "mon, and almost universal practice; yet there are few "railroad charters which expressly authorize this prac- "tice. It would hardly be contended that such an act of "interchange is *ultra vires* upon the part of a railroad "company whose charter is silent as to such authority. "As incidental to the operation of its road, a railroad "company has the power to interchange cars with other "connecting companies, and this is the ordinary and "usual way of doing business. We are clearly of the "opinion that the legislature has the power to compel a "common carrier to do business in the ordinary and "usual way, and therefore may compel such interchange "of cars as incidental to the business for which the com- "pany was chartered. The Supreme Court of Iowa "reached the same conclusion in Burlington, etc., R'y "Co. vs. Dey, 82 Iowa, 312; see also Atchison, etc., R. "Co. vs. Denver, etc., R. Co., 110 U. S. 667; Peoria, etc., "R. Co. vs. Chicago, etc., R. Co., 109 Ill. 135; Michigan, "etc., R. Co. vs. Smithson, 45 Mich. 212; State vs. "Michigan, etc., R. Co., 83 Mo. 144."

Now as a matter of fact the judgment of the Minnesota court did not require the delivery of cars by one company to

another, and what was said by the court, as is manifest from the opinion, was simply in answer to the railroad company's argument that it would be no use for the court to require the connecting track to be put in between the two lines of railroad, because if such should be done there would then be no power to require the railroads to interchange cars; and the answer of the court to the argument is very much in line with the argument of the Iowa court in Burlington, etc., R. Co. vs. Dey, *supra;* the argument in the two cases being practically to the effect that it is *not beyond the power* of railroad companies to deliver their cars to other companies; and that the court takes judicial notice of the fact that this is a "common and almost universal practice" among railroad companies; and that the State has the power to command railroad companies "to do business in the ordinary and usual way;" in other words, that the State *has the power to compel railroad companies to do anything which they have theretofore done voluntarily.*

This argument finds a complete answer in the language of the Supreme Court of the United States in Lake Shore, etc., R. Co. vs. Smith, 173 U. S. 684. In this case the Supreme Court of Michigan had held valid the statute of that State compelling a company to sell thousand-mile tickets at a certain rate, it being shown in support of the validity of the act that the company had been in the past accustomed to doing this. On writ of error this court reversed this judgment, holding the act unconstitutional, and in the course of the opinion by Mr. Justice Peckham, said:

"It is no answer to the objection to this legislation to "say that the company has voluntarily sold thousand-"mile tickets, good for a year from the time of their sale. "*What the company may choose voluntarily to do furnishes*

"*no criterion for the measurement of the power of the* "*legislature. Persons may voluntarily contract to do* "*what no legislature would have the right to compel them* "*to do.* Nor does it furnish a standard by which to "measure the reasonableness of the matter exacted by "the legislature. The action of the company upon its "own volition, purely as a matter of internal administra- "tion, and in regard to the details of its business, which "it has the right to change at any moment, furnishes no "argument for the existence of a power in the legislature "to pass a statute in relation to the same business impos- "ing additional burdens upon the company." (Page 697.)

This language is so complete an answer to the argument of the courts of Minnesota and Iowa in the cases above mentioned, that nothing we could say would add to the force of it.

Moreover, the fact of which those two courts say they take judicial notice as to the practice of interchanging cars, a practice which they seem to think is *universal* and exercised *upon demand*, is in truth not a fact. Of course exchanges of cars are made very frequently, but they are made upon conditions and under circumstances which are regulated by contracts between the companies which make the exchanges, the companies always reserving the right to refuse to make such exchanges as conditions may vary, and as the interests and convenience of the several companies may require from time to time. In other words, railroad companies exercise over this character of property in this matter exactly the same rights and powers which individuals exercise over their property, to wit, the right to use it themselves when their interests so require, or to permit others to use it when the interests of the owner so demand or permit. In the case of Oregon Short Line R. Co. vs. Northern Pacific

R. Co., 51 Fed. Rep. 465 (afterwards affirmed in 61 Fed. Rep. 158), Mr. Justice Field in holding that a railroad company could not be required to receive cars from other companies, when it had cars of its own in which it could haul the freight, states the substance of a large amount of testimony of railroad men in that case on this subject of exchange of cars, and quotes quite at length from the testimony of the general manager of the Northern Pacific Railroad, in which he said:

> "The method of handling through business inter-
> "changed between railroads is controlled by various cir-
> "cumstances, in some cases by traffic contracts, which
> "provide for cars going through without transfer or
> "breaking bulk. In many cases it is controlled by con-
> "ditions of what we might term the car market; that is,
> "by the *car supply*. There are times when railroads east
> "of St. Paul give orders at the transfer to permit none
> "of their cars to go beyond St. Paul. There are times
> "when they permit their cars to go through without
> "breaking bulk. On the other hand, there are times
> "when the railroads north and west of St. Paul do not
> "take through cars, even when the roads tendering them
> "are willing to have them go through, because they
> "have sufficient of their own cars," etc. (51 Fed. Rep. 471.)

In the case at bar there is no allegation in the bill of complaint of any custom or practice on this subject of exchanging cars. It is true that there is one sentence in the affidavit of Mr. T. C. Powell in which he says: "It is the universal custom between reputable and solvent railroad companies to make delivery of carload lots of freight of any

and all kinds without exacting prepayment of freight under notices of the character above set forth, where the receiving common carrier becomes responsible for such delivery and collection of all charges on same." (Rec., p. 25.) But this statement is emphatically denied by Mr. Walker D. Hines, who, "on the contrary, says that every railroad company holds itself free to make such exceptions as it thinks proper and as it regards to be in its interest, and that it is not only not the universal custom, but it can not be said to be at this time the general practice, for a railroad company to deliver its cars to other railroad companies, since on account of the present scarcity of cars every company does all it can to keep its own equipment on its own lines." (Rec., 55.)

We repeat, therefore, that what the Supreme Courts of Iowa and Minnesota said they would take judicial notice of is in truth not a fact. Railroad companies do not exchange cars *on demand*, and under all circumstances and conditions; and the fact that they do make such exchange under some circumstances and under some conditions, which are within their control and are regulated by voluntary contracts, vests in no tribunal, national or State, judicial or legislative, the power to require them to deliver up their cars to other companies against their consent.

The case of L. & N. R. Co. vs. Williams, 95 Ky. 188, cited by counsel for appellant, was simply an action for personal injury where the plaintiff as an employe had been injured by a defective car received from the line of another road. The Court of Appeals simply held that the provisions of the Constitution of the State did not require the company to receive a defective car from another road. There was in fact no adjudication to the effect that it was required to receive cars in good condition. And there was neither adjudication nor intimation that the railroad company was itself required to deliver its own cars to other roads.

The case of Michigan Central Railroad Co. vs. Smithson, 45 Mich. 212, also cited by counsel for appellant, was a case of the same character as the Kentucky case above mentioned. An employe claimed to have been injured by a defective car which the defendant company had received from a connecting line. The court in that case held that the statute of Michigan required the defendant to receive and haul the cars of other lines. There was no statement or suggestion in the opinion on the subject of the duty of one railroad company to deliver its cars to other lines.

The case of Inman vs. St. Louis, etc., R. Co., 37 S. W. Rep. 37, cited by counsel for appellant, and being a decision by the Texas Civil Court of Appeals, has no bearing whatever on the question of the power to require railroad companies to interchange cars. It bears simply on the question of interchanging freight. There was neither assertion nor adjudication that it was the duty of the receiving company to deliver its cars to a connecting line.

We repeat, therefore, that the power does not exist, otherwise than in the exercise of the right of eminent domain, to take from the Louisville & Nashville Railroad Company its cars and give them to the Southern Railway Company.

VII.

Construction of State Constitution.

Finally, although we do not believe the question legitimately arises in this case, because we do not believe the State of Kentucky has a right to prescribe regulations for the government of interstate commerce, to which this case is expressly and exclusively confined, we submit that Section 213 of the Constitution of Kentucky, when properly construed, does not purport to require railroad companies to

deliver their own cars to other companies for use by the latter. The language is:

> "All railway, transfer, etc., companies . . . doing a "railway business in this State, shall *receive*, *transfer*, "*deliver and switch empty or loaded cars*, and shall move, "transport, receive, load or unload all the freight in car- "loads or less quantities, coming to or going from any "railroad, transfer, belt line bridge or siding thereon, "with equal promptness and dispatch, and without any "discrimination . . . . and shall so receive, deliver, "transfer and transport all freight, as above set forth, "from and to any point where there is a physical con- "nection between the tracks of said companies. But "this section shall not be construed as requiring any such "common carrier to allow the use of its tracks by the "trains of another engaged in like business."

It may be conceded that the language "shall receive, transfer, deliver and switch empty or loaded cars" requires the company to *receive* the cars of other companies when offered to it, and to *transfer and deliver such cars as are thus received*, but the language does not go beyond this. Certainly if it were intended to require a railroad company, against its consent, to give up its cars to another company, although it might be, and often is, in great need of them itself, such a requirement ought to be expressed in *unequivocal language*. Oregon Short Line vs. Nor. Pac. R. Co., 51 Fed. 475, opinion by Mr. Justice Field; same case, 61 Fed. 158, opinion by Mr. Justice McKenna; Chicago, etc., R. Co. vs. Osborne, 52 Fed. 914, opinion by Mr. Justice Brewer; Little Rock, etc., R. Co. vs. St. Louis, etc., R. Co., 63 Fed. 779, opinion by Judge Thayer. And we submit that the language here used does not meet this requirement. We can readily understand how a requirement might be made that a railroad

company should receive loaded cars from other companies and transport them, when the owners of the cars were willing to give them up and desired to have them transported. In fact, as we have already seen, the Supreme Court of Illinois has held that a railroad company is a common carrier of cars as well as it is of freight. Such a principle, therefore, might induce the legislature or a constitutional convention to make express provision, whether it might be considered as creative or only declaratory law, that all railroad companies should, without discrimination, receive and transport all cars offered to it, just as all freight offered to it. Yet this falls far short of a requirement that a railroad company shall, against its consent, be required to give up its own cars, which are its valuable property, to the possession and control of another. The language used in the Constitution of Kentucky is altogether consistent with the idea that railroad companies are required to receive and transport the cars of other companies, and to deliver such cars as they do thus receive and transport, but are not required to surrender and deliver their own cars against their consent to other companies.

The sentence in which this language occurs is very long and very much involved, but we submit that it falls short of expressing a requirement that the railroad company shall, against its consent, surrender its cars to another company for use by the latter.

CONCLUSION.

In conclusion we submit the following propositions:

1. The rights asserted by complainant in this case certainly did not exist at common law. If they were created by the Interstate Commerce Act, that act points out specific remedies for their vindication, which remedies are exclusive of all others (as to rights created by the act), and a suit in equity

for an injunction on behalf of the party claiming to be injured is not one of the remedies pointed out by that act.

2. Complainant has no such legal interests in the performance of those duties which it claims that defendant is disregarding as give rise to a cause of action in favor of complainant on account of the alleged violation of those duties.

3. This case does not in truth and in substance involve a question of the right to require a railroad company to deliver freight to a connecting carrier for transportation to a destination beyond the line of the receiving company, but really and truly and in substance involves a question as to the character of *delivery* which the railroad company can be required to make of freight *when it has reached its destination.* And, being thus understood, this case is controlled by Cov. Stock Yards Co. vs. Keith, 139 U. S. 128, which holds that a railroad company engaged in transporting live stock to a city has the right to establish a live stock depot in that city, through the instrumentality of a stock yards company, and to contract to deliver all live stock at that point, and that it can not be required to make deliveries at any other point.

4. If the case, however, be regarded as involving the duties of railroad companies in delivering freight to connecting companies for the purpose of transportation to points beyond the line of the receiving company, then we submit that, neither at common law nor under the Interstate Commerce Act, is a carrier required to receive freight marked for a destination beyond its own line, and much less is it required to surrender and deliver its own cars containing such freight to another carrier to be used in transporting the same to its destination over the lines of the latter, and especially where it is asked to look to the connecting carrier for the collection and ultimate payment of the charges on the freight.

5. If Section 213 of the Constitution of Kentucky be properly construed to require a railroad company to receive live stock in Tennessee, and to issue a bill of lading for the same showing their destination to be a point in Kentucky beyond the line of the receiving company, and on the line of a connecting company; or (with or without a bill of lading) to carry live stock thus received in Tennessee by a continuous shipment to a point in Kentucky, and there to deliver the same, in the cars in which they were received in Tennessee, to a connecting carrier in Kentucky for transportation by the latter to a point beyond the line of the receiving company, then this is an attempt by Kentucky to regulate interstate commerce, as strictly defined in County of Mobile vs. Kimble, 102 U. S. 691, and is therefore void.

6. There is no power in any tribunal, whether State or national, whether judicial or legislative, to require a railroad company, against its consent, to surrender and deliver its property, to wit, its cars, to another railroad company for use by the latter in the transportation of freight over the lines of the latter. To do so would be to take the property of the company without due process of law.

7. Section 213 of the Constitution of Kentucky, when properly construed, does not require a railroad company to deliver its cars, against its consent, to another company for use by the latter.

Respectfully submitted,

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Of Counsel.

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APPENDIX.

I.

English "Railway and Canal Traffic Act" of 1873, Section 11.

11. Whereas by Section Two of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company and canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company and railway and canal company having or working railways or canals which form a part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be

offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf.

And whereas it is expedient to explain and amend the said enactment, be it therefore enacted, that

Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding and delivering by every railway company and canal company, and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls or fares (in this act referred to as through rates).

Provided as follows:

1. The company requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded.

2. Each forwarding company shall, within the prescribed period after the receipt of such notice, by written notice, inform the company requiring the traffic to be forwarded whether they agree to the rate and route; and, if they object to either, the grounds of the objection.

3. If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration.

4. If any objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the Commissioners for their decision.

5. If any objection be made to the granting of the rate or to the route, the Commissioners shall consider whether the

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granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly.

6. If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the Commissioners as to its apportionment shall be retrospective; in any other case the operation of the rate shall he suspended until the decision is given.

7. The Commissioners in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof.

8. It shall not be lawful for the Commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route.

9. The prescribed period mentioned in this section shall be ten days, or such longer period as the Commissioners may from time to time by general order prescribe.

Where a railway company or canal company use, maintain or work, or are party to an arrangement for using, maintaining, or working, steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby.

II.

Interstate Commerce Act, Section 3.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

III.

Amendment to Interstate Commerce Act, Recommended by Interstate Commerce Commission December 1, 1888, but NOT ADOPTED by Congress.

(*2nd Interstate Commerce Commission Reports, Page 511.*)

The facilities to be so afforded shall include the due and reasonable receiving, forwarding and delivering by every

such common carrier, at the request of any other such common carrier, of through traffic at through rates or fares. If any one of such common carriers shall desire to form a through route for interstate traffic or any class thereof over its own line or any part thereof, in connection with the line or any part of the line of one or more other common carriers, it shall address a request in writing to the other common carrier or carriers, describing therein the proposed route specifically, and naming proposed through rates or fares and division thereof for such traffic, and shall deliver such request to such other carrier or carriers, and also transmit a copy thereof to the commission hereinafter named. If the other common carrier or carriers shall not, within ten days after receiving such request, make and serve and file with the commission, written objections either to the proposed route or to the proposed rates, fares or divisions, the same so far as not objected to shall be deemed agreed to; but if either the route, the rates, or fares, or the divisions, are objected to, the objections shall be stated in writing and transmitted to the commission, and the commission shall then have power to determine whether, having regard to all the circumstances, the route proposed is demanded in the public interest and is a reasonable route for the traffic, and if the commission shall so find, and the rate or divisions are not assented to, the commission shall have the further power to prescribe the same; but the commission in any case, in apportioning the through rate, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part thereof, as well as any special charges which any such common carrier may have been entitled to make in respect thereof, and it shall not be lawful for the commission in any case to com-

pel any company to accept lower mileage rates than the mileage rates which such company may, for the time being, legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route.

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Office Supreme Court
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JAMES H. McKENNEY

No. 486 149

Supreme Court of the United States.

CENTRAL STOCK YARDS COMPANY, - - - Appellant,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE

(Commenting on Judge Miller's Opinion, printed and filed since submission in this court.)

APPENDIX.

Opinion by Judge Henry S. Barker, Judge of the Jefferson Circuit Court, in Union Stock Yards vs. L. & N. R. Co.

HELM BRUCE,
Counsel for Appellee.

P. C. NUNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States

CENTRAL STOCK YARDS COMPANY, ... *Appellant*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee*.

Since the argument of this case counsel for appellant has printed and sent to the clerk, for distribution among the members of the court, an opinion of Judge Miller of the Jefferson Circuit Court (of Kentucky) in a case of the same style as the one at bar, though, in fact, a different case. Of course, we do not object to this, and, in fact, it was rather suggested by the court during the argument. But as it was not part of the record, nor in any manner before the court so that it could be commented upon at the argument, and as *another opinion* has been delivered by a different judge of the same Jefferson Circuit Court, reaching quite different conclusions, we hope we may be allowed the privilege of making some suggestions as to Judge Miller's opinion, and of presenting to the court also the opinion of Judge Henry S. Barker, who at the time of the delivery of this opinion was a judge of the Jefferson Circuit Court, but has since become, and is now, a judge of the Court of Appeals of Kentucky.

The opinion of Judge Miller was delivered on a mere motion for a preliminary injunction, before answer filed by the defendant. The statement by the court of the defenses pre-

sented is merely the court's attempt to state the substance of arguments and affidavits, and is not an accurate statement of what we understood our arguments and affidavits to mean. Moreover the affidavits filed in that case were not the same as those filed in the case at bar, though of course there are many points of similarity.

After the entry of the preliminary injunction a motion was made before a single judge of the Court of Appeals to dissolve it; but he declined to disturb the status of the litigation, saying "the case will probably come before the Court of Appeals for final judgment in a short time." That was in December, 1901, more than two years ago, and the case is still in the Circuit Court, having never been finally decided, and having been under submission for nearly a year; though in the meantime defendant has been compelled to obey the injunction.

Of course it will be observed that Judge Miller does not in his opinion mention interstate commerce. He discusses the case purely as a Kentucky affair, and states conclusions as to common law duties and obligations, and as to the meaning and effect of certain provisions of the Constitution of Kentucky. His views are very radical and in some respects are in direct conflict with those which had theretofore been expressed in an opinion by Judge Barker in the case of *Union* Stock Yards vs. Louisville & Nashville R. R. Co., which is printed in full in an appendix hereto, and will be referred to presently.

It is somewhat difficult to state exactly Judge Miller's conclusions as to the common law applicable to the case. He seems to conclude that *even at common law*, independent of the Kentucky Constitution, the plaintiff would be entitled to the relief asked (page 14 of printed opinion), and yet when he comes to discuss cases relied on by defendant to support a

contrary view of common law obligations, such as Covington Stock Yards vs. Keith, 139 U. S. 128, and Butchers' Stock Yards vs. L. & N. R. R. Co., 67 Fed. R. 36, he says of them that they were common law cases, and that "as this case is purely and simply a switching case under the 213th section of the Constitution, those cases can not be said to be in conflict with the conclusion heretofore reached." (Page 15.)

In treating of the provisions of the Constitution Judge Miller holds that the case is really covered not only by Section 213, which is quoted in full in our original brief (page 74), but also by Section 214, which is as follows:

> "EXCLUSIVE OR PREFERENTIAL CONTRACT FOR-
> "BIDDEN.—No railway, transfer, belt line or railway
> "bridge company shall make any exclusive or preferential
> "contract or arrangement with any individual, associa-
> "tion or corporation, for the receipt, transfer, delivery,
> "transportation, handling, care or custody of any freight,
> "or for the conduct of any business as common carrier."

Speaking of this section, Judge Miller says:

> "Section 214 of the Constitution does not mean that a
> "carrier must build platforms or chutes, etc., for any and
> "all who may want stock yards on the line of the road,
> "but it *does mean* that all individuals and all corporations
> "engaged in the stock yards business must be treated
> "alike, and no exclusive or preferential contract for the
> "care and custody of stock can be made." (Page 9 of opinion).

In other words, Judge Miller holds that Section 214 of the Kentucky Constitution in effect nullifies the principles established by Covington Stock Yards vs. Keith, 139 U. S.,

and Butcher's Stock Yard vs. L. & N. R. R. Co. 67 Fed. R.

Now, to show what different views of these provisions of the Kentucky Constitution as to commerce have been taken by different judges, we append hereto the opinion, heretofore mentioned, of Judge Barker, which is based on the view taken by the Court of Appeals of Kentucky of the general purpose of these various provisions as to commerce. Judge Barker's opinion was delivered in the case of Union Stock Yards vs. L. & N. R. Co., which was exactly like the present case, except that the Union Stock Yards are adjacent to the tracks of the Louisville & Nashville Railroad Company, while the Central Stock Yards are adjacent to the tracks of the Southern Railway.

Judge Barker, as will be seen from this opinion, held that the Constitution of Kentucky was not intended to affect, and did not affect, the principles asserted in Covington Stock Yards vs. Keith, and Butchers' Stock Yards vs. L. & N. R. Co.; that, whether Section 213 or 214 be considered, the only purpose was to prevent unjust discrimination, and he based this conclusion very largely on the view taken by the Court of Appeals of Kentucky of the general scheme of these constitutional provisions, as expressed in its opinion in Commonwealth of Kentucky vs. L. & N. R. Co., 108 Ky. 628 (22 Ky. Law Rep. 328), in which the Court of Appeals, in stating the effect of various constitutional and statutory provisions on the subject of commerce, speaks as follows:

"Section 213 requires companies to receive and handle "loaded and empty cars and freight in carloads, etc., "coming from other companies *without discrimination or* "*preference*, etc. Section 214 was designed to compel "the carrier to perform the service of receiving, transport- "ing and handling freight without exclusive or preferen- "tial contract or arrangement, and secures *equality of*

"*service*, leaving the succeeding section to secure *equality* "*of charges.*" (Our italics. 108 Ky. 633.)

And again, in the same opinion, as pointed out by Judge Barker, the court, referring to the English Railway and Canal Traffic Act, and to the Interstate Commerce Act, says that "the thing aimed at in all these statutes is the prevention of unjust discrimination;" and that the aim of the Kentucky Constitution, referring especially to Sections 196, 214 and 215, is the same; the Court of Appeals saying:

> "The purpose was to secure equality between shippers, "and prevent injustice or unjust discrimination. It can "not be maintained that the convention contemplated "that there should be no discrimination, for it was "notorious that there were many discriminations not "regarded as unlawful, and Section 194 expressly recog- "nizes that such discriminations as are not unjust may "be made." (108 Ky. 644).

It is true that in the immediate connection in which this last quoted language is used the court does not expressly refer to Section 213; but it does expressly mention Sections 214 and 215; and it had, as above shown, previously coupled these several sections together in speaking of them in a preceding part of the opinion (page 633), and it is manifest that all belong to the same scheme of legislation.

For convenience of the court, these several sections, 196, 213, 214, and 215 are printed in juxtaposition in the appendix to this brief, immediately following Judge Barker's opinion.

Thus it will be seen that the Court of Appeals of Kentucky, manifestly treats the main purpose of Section 213 as being to prevent *unjust discrimination* in the matters there treated of, and not as requiring absolutely the interchange of cars under all circumstances and conditions.

But Judge Miller treats Section 213 as establishing an iron-bound rule, applicable under all circumstances and conditions covered by its terms, and places a literal construction upon these terms.

If we carry out this principle of construction, the provisions of Section 213 will become intolerable. The section does not apply alone to car-load lots of freight, but to "car loads or less quantities," and requires carriers to "load or unload all the freight, in car loads or less quantities," at points of physical connection. Now, the Louisville & Nashville Railroad Company has physical connection with several different railroad and bridge and transfer lines between the point where it enters the city of Louisville and its general freight depot. If it is hauling a car load of miscellaneous freight, consigned to various consignees in the city, can it be compelled to stop at the Southern Railway crossing and take out and deliver to the Southern Railway a keg of nails consigned to some one who lives near the Southern's depot; and then run along till it reaches a connection with, say, the Illinois Central's tracks, and again stop and deliver to it a box of soap which may be consigned to some one living near the Illinois Central's depot; and so again at an intersection with the Louisville Bridge Company's tracks, etc., etc.? This would cause great delay and annoyance, and would be intolerable. It is not possible to believe the Constitution means this, and yet it comes within its literal terms as much so as the case before Judge Miller, or before this court. If such construction be adopted, and the section be held to be applicable to interstate commerce, it is not only a *regulation* of interstate commerce, but a *great burden* upon it.

Again, we call the court's attention to the fact that the language of the Court of Appeals in Commonwealth vs. L. & N. R. Co., 108 Ky., *supra*, in summarizing the effect of Section 213 of the Constitution, directly supports the con-

tention in our original brief (pages 100, etc.), that the language of this section (even literally read) does not require a company, against its will, to *deliver its own cars* to another company, but only to *receive* cars *from* other companies that may offer them. The language of the court, as heretofore quoted, is:

> "Section 213 requires railroad companies to *receive* "and handle loaded and empty cars and freight in car "loads, etc., *coming from other companies* without discrimi- "nation or preference, etc." (Our italics. 108 Ky. 633.)

As to Judge Miller's statement that about five miles of transportation are saved in delivering to the Central Stock Yards rather than to the Bourbon Stock Yards, we call attention to the fact that accurate measurement shows a difference of *one-tenth of a mile* from the South Louisville yards of appellee to the two respective yards (Rec., 54).

In conclusion, we will simply say that if Section 213 means what Judge Miller says it means, and railroad companies must deliver up their cars to connecting lines, there is absolutely no provision made, either by Constitution or Statutes, to regulate such business; no provision as to how long a connecting line thus receiving another company's car may keep it; no provision as to what use it may put it to; no provision as to what it must pay for it. All this is left absolutely without regulation. A company, however much it needs its cars, must let them go; and the connecting company can deliver them to the next connecting company, etc., etc.; and there is no provision whatever as to when they shall be returned, or what shall be paid for their use.

Respectfully submitted.

HELM BRUCE,
Counsel for Appellee.

February 4, 1904.

APPENDIX.

I.

Opinion by Judge Henry S. Barker.

JEFFERSON CIRCUIT COURT.

Union Stock Yards, ... *Plaintiff,*

vs.

The Louisville & Nashville Railroad Company, ... *Defendant.*

Opinion.

This action was instituted by the plaintiff, a corporation engaged in the stock yards business in Louisville, Ky., against the defendant, a railroad corporation, for the purpose of obtaining a mandatory injunction requiring the defendant to deliver to the plaintiff, on its private switch, which connects with defendant's passenger line running along Pocahontas street, such car load lots of stock as may from time to time be consigned to it, by its customers, and to receive on said switch for shipment such car load lots of live stock as it may from time to time desire to ship out of Louisville to its customers.

The defendant makes no concealment of the fact that it has in the past refused to deliver or receive live stock on

the plaintiff's switch, or that, unless required to do so by the order of this court, it intends to continue such refusal in the future. As a justification of such refusal, it urges, among other things, the following propositions: First, that the plaintiff corporation is not in good faith carrying on a public stock yard fully and sufficiently equipped with the facilities necessary for the operation of such business. Second, it denies that plaintiff is the owner and entitled to operate the switch described in the petition. Third, it alleges that many years ago it established by a contract with the Bourbon Stock Yards Company, a corporation also engaged in operating a public stock yard in Louisville, a general live stock depot on the grounds of the latter company, whereat it delivers rapidly and safely, without favor or discrimination, all of the live stock hauled over its lines, billed to Louisville, and where it receives for shipment all live stock to be shipped over its lines out of the city; and that this depot is amply sufficient for all of the needs of the live stock business in the City of Louisville. Fourth, it alleges that the switch in question is unsuitable and insufficient for the needs of the live stock business, and, being located on one of its main passenger tracks or lines, the delivery and shipment of live stock on said switch entails upon it a greater burden in time, cost and hazard than if the delivery or shipment took place at the defendant's general live stock depot in the yards of the Bourbon Stock Yards Company.

There was little, if any, contrariety of evidence adduced upon the hearing of the motion for an injunction, and I have had no difficulty in reaching the conclusion that the plaintiff is, in good faith, embarked in the live stock business, and that, while not possessed of as ample facilities as the Bourbon Stock Yards Company, which is a much older company, it is reasonably well equipped for such patronage as a beginner

may expect to receive; that the men composing the corporation are honest, high-minded stock men, with all the capital and energy necessary to make accommodation grow with the business in which they are engaged; that the plaintiff is the owner and entitled to the use of the switch in question; that the defendant corporation long before the creation of the plaintiff corporation, in good faith, entered into a contract with the Bourbon Stock Yards Company by which is established a general live stock depot for Louisville in the yards of the Bourbon Stock Yards Company, and employed said corporation as its agent to load and unload all the live stock shipped to or from Louisville by the defendant corporation; that said depot has been operated for the purposes mentioned under said contract, from the date of its establishment, until the present time, and is reasonably sufficient for the requirements of the live stock market in Louisville; that in the operation of said depot, as a depot, no invidious or unjust discrimination is made between consignees' or consignors' live stock; that there is no charge made for yardage, nor for the service of loading or unloading stock. That it entails upon the defendant a much greater burden in time, cost and hazard to deliver plaintiff's stock on the switch in question than to deliver it at the defendant's depot in the Bourbon Stock Yards. That it would greatly advantage the plaintiff's business to have its stock shipped to and from its own switch by the defendant company.

From the establishment of these facts arise two questions of law, the solution of which must decide this case. First, under the law as it now exists in Kentucky, may a railroad corporation establish a general live stock depot in the yards of a stock yards corporation, where, through the agency of said stock yards company and its employes, all the live stock shipped to or from a city is loaded and unloaded, provided

the service in said depot is free and equal, and said depot is sufficient for the requirements of the live stock business in said city?

Second, if the foregoing proposition be answered in the negative, may one stock yards corporation demand of a railroad corporation a special service to it in the delivery or shipment of its stock, when such service entails a substantial increase in time, cost or hazard to said railroad corporation, over a similar service rendered to a business rival of said stock yards corporation in the same city?

These are grave questions, and it is highly important, both to the parties to this litigation and to the public, that the law governing them be clearly ascertained and fully administered.

By the rules of the common law, common carriers are held to exercise a *quasi* public trust, and are forbidden to make unjust or unlawful discriminations between their patrons. In the Constitutions or the statutes (sometimes in both), of nearly—if not quite—all the States of the Union, and in the Act of Congress known as the Interstate Commerce Act, there are provisions bearing upon and seeking to regulate and control this subject. The language used in these several enactments varies in its verbiage, but, when scanned closely, means about the same thing. These various enactments are merely declaratory of and seek, by means of penalties, to more efficiently and thoroughly enforce the provisions of the common law. This is expressly decided in the case of the Commonwealth vs. the L. & N. R. R., 22 L. R. 328, wherein the Court of Appeals say:

> "The common law required common carriers to serve "all alike. In aid of this rule of the common law, the "English Railway and Canal Traffic Act was passed, in

"1854, to forbid and punish discrimination. This was "followed by the Interstate Commerce Act of the United "States, and similar statutes and constitutional provisions "of many of the several States. The thing aimed at in "all of these statutes is the prevention of unjust discrim- "ination. In the same line is Section 196 of our Con- "stitution: 'Transportation of freight and passengers "by railroad, steamboat, or other common carrier, shall "be so regulated by general law as to prevent unjust "discrimination.' Also Section 214: 'No railway "company shall make any exclusive or preferential con- "tract or arrangement . . . . for the conduct of any "business as a common carrier.' Section 215 is a part "of the scheme covered by Sections 196 and 214. It "requires all railroads to transport in the same manner, "for the same charges, and for the same method of pay- "ment, freight of the same class, for all persons, from "and to the same points, and upon the same conditions. "The purpose was to secure equality between shippers "and to prevent injustice, or unjust discrimination. It "can not be maintained that the convention contem- "plated that there should be no discrimination, for it "was notorious then that there were many discrimina- "tions not regarded as unlawful, and Section 194 "expressly recognizes that such discriminations as are "not unjust may be made."

After setting forth the different expressions used in the various statutes bearing upon the subject, the court say :

"All these expressions in the various statutes on the "subject of unjust discrimination mean the same thing, "and the authorities determining the effect of the various

"statutes on the subject are directly in point. This (the "prevention of unjust discrimination) is the purport of "every law on the subject involved, to which our atten- "tion has been called, and enactments on this character "are found in perhaps every State in the Union. The "purpose of all these are the same. Our own statute "only prohibits different or discriminating charges 'for a "like and contemporaneous service.' Our Constitution "does not use these particular words, but uses the broader "and more comprehensive expression, 'upon the same "conditions.'"

I have set out the exact language of the court in this the leading case in this State on the subject in hand, at perhaps tedious length, because I deem it important to ascertain in the outset whether the rules of the common law are to be considered in the decision of this question, or whether our Constitution provides a new and revolutionary rule upon the subject in hand. This question was the pivotal point in the case cited; it being contended, both at bar in the argument and afterwards by some of the court in their deliberations, that the constitutional provisions under examination afforded a new and rigid rule forbidding *all* discrimination among persons doing business with common carriers, without reference to the justice or injustice of the same. This was the real battle ground, both at bar and in the consultation room, as is clearly shown by the dissenting opinion. But the opinion of the court most clearly determines that all of the constitution and statutory provisions of our State contain one general scheme in aid of the common law rule, forbidding to common carriers not all discrimination, but all unjust or unreasonable discrimination between their customers or patrons; and this being

true, decisions of similar propositions arising at common law by judicial tribunals are directly in point.

The question involved in the first proposition arose in the case of the Covington Stock Yards vs. Keith, 139 U. S. This case can not be distinguished in principle from the case at bar. There, as here, were two rival stock yards on the line of the railroad; there, as here, the railroad had a contract with one of these to establish a general live stock depot in its yards, where all live stock hauled, or to be hauled, by it was received or shipped; but with this difference, that the stock yards company which undertook, as agent of the railroad, to handle the stock, made a charge for yardage against all shippers. This, the Supreme Court held, it could not do, but held that if no charge was made for yardage, and no preferences shown in the manner of handling the stock, the plaintiff stock yards company would be without just ground for complaint. It was held in this case that it was the right and duty of the railroad company, as a common carrier of live stock, to establish and maintain a live stock depot in Covington, the use of which should be free to all shippers of live stock and should be sufficient for the requirements of the live stock business in that city, and that, this being provided, it was no concern of the complaining company that the railroad company contracted with another (and rival) stock yards company to discharge for it this duty to the public. The deduction is clearly drawn that no advantage which arises out of, and is merely incidental to, the discharge by a common carrier of a duty to the public is an unjust or preferential discrimination at the common law.

The same question arose in the case of the Butchers, Stock Yards Company vs. the L. & N. R. R. Co., 67 Federal R. The opinion of the Circuit Court of Appeals, which was delivered by Judge Taft, cites the Keith opinion

at great length, and, of course, with approval. It seems to me that these two cases are conclusive of this branch of the case. If the opinions of Circuit Judges Baxter and Baker, cited by counsel for plaintiff, are antagonistic to the opinions of the Supreme Court and the Circuit Court of Appeals, they must yield to superior authority, as those learned judges would themselves hasten to do, if they sat in this case.

It takes but little reflection to see that it can make no practical difference to the plaintiff whether the Louisville & Nashville Railroad Company operates the live stock depot itself, or employs the skilled stock men of the Bourbon Stock Yards Company to load and unload their live stock for them; while it is evident that by the use of such skilled stock men the public obtains a better service. The evidence shows that the contract between the L. & N. R. R. Co. and the Bourbon Stock Yards Company was made years before the incorporation of the plaintiff company, and there is nothing in the record to show that there was in Louisville at the time any other stock yards than the Bourbon; it was the duty of the railroad to provide a depot for live stock, and it seems to me it made the best arrangement for the general public by employing people who are skilled in the handling of live stock to perform this duty. At this depot, so organized and maintained, the live stock of the plaintiff is received and handled without charge, and without any discrimination against it in the handling. This, under the authorities before cited, and which, I think, control this case, is all that the plaintiff can lawfully demand.

As to the second proposition, the evidence shows that the plaintiff's yards lie along Pocahontas street, whereon is one of the defendant's main passenger tracks. Connecting these tracks with plaintiff's yards is a short spur switch, put in by

the lessor of plaintiff for the shipment and delivery of dead freight. No live stock has ever been delivered on or shipped from this switch except by order of this court. The evidence shows clearly that there is a vast difference between the handling of live stock and the handling of dead freight—that the latter can be kept by the railroad company for an indefinite time in its distributing yard, and be delivered at the convenience of the carrier; whereas live stock, for at least a large part of the year, would be in danger of perishing by being kept even for a few hours in the cars after arrival, and must suffer at all times by even a slight delay in the unloading. The track along Pocahontas street, as stated before, is one of defendant's main passenger lines, on which its passenger trains of necessity have the right of way; it is often both inconvenient and hazardous to undertake to deliver freight upon the switches touching this line; in the case of dead freight, the carrier simply awaits its opportunity, and delivers when it can with safety; but with live stock it must of necessity confront the hard dilemma of either seeing the animals perish or be seriously injured, on the one hand, or endanger the lives of its passengers and its employes, on the other.

If the plaintiffs can demand this special service, then the Packing Company and Vissman & Company, who have switches connecting their property with the Pocahontas street line, and any and all others who may open a live stock business along said street may have a similar special service, and it would be entirely within the bounds of probability that the defendant company would in a short time have to abandon altogether the passenger traffic over said street.

We have seen that the Court of Appeals in the case of Commonwealth vs. L. & N., 22 L. R., have decided that all of the provisions of the Constitution and statutes relating

to discriminations form one scheme in aid of the common law rule against unjust or unreasonable discrimination, and that, where the conditions are substantially different, the discrimination is not unreasonable or unjust, and, therefore, not forbidden. In the case cited, the Court of Appeals held that between two consignees of coal in the same town, one being a miller and the other a coal dealer, the R. R. Co. might charge the miller less for steam coal than it charged the dealer in coal, because the miller used the coal to manufacture flour, and as this was shipped over the railroad company's line, it obtained an additional freight rate, and therefore the conditions were not the same. If a mere monetary advantage authorizes a discrimination between shippers, for a greater reason is a discrimination allowable where the difference in the conditions of service entails a greater hazard to life and property.

Learned counsel for plaintiff, both in the argument at bar and in their brief, contended that this case rests upon the provisions of Section 213 of the Constitution rather than Sections 196, 214 and 215. I do not see the utility of the contention, since the Court of Appeals have decided that the question of discrimination must be determined by the rules of the common law; but if there is a difference, the courts have decided the contention against the plaintiff:

> "Sec. 213 requires railroad companies to receive and "handle loaded and empty cars, and freight in carloads, "etc., coming from *other companies* without discriminating "preference, etc." (L. & N. R. R. Co., 22 L. R.)

And in the case of the Louisville & Nashville R. R. vs. Williams, 95 Ky. 199, the court held that it was not the duty of a railroad company, under the provisions of Sec. 213 of

the Constitution, to receive from another company a car in a dangerous condition, or one the construction of which made it dangerous to handle. This was a damage suit against the railroad company, and the evidence showed the car causing the damage was received from another company. The defendant railroad sought to shield itself from responsibility by pleading that under Sec. 213 of the Constitution, it was bound to receive and transport the cars, etc., etc., but the court said, not so—the section in question did not require any service which endangered life and limb. Applying that principle to the case at bar, it becomes imperative that I should hold that even if Section 213 controlled this case, still the defendant is not bound to perform under its provisions any service which endangers the lives of its passengers or employes, since there can not be a difference in principle between a service in handling a car which is in a dangerous condition, and a service which entails the delivery of a car at a point that would create danger.

The motion for an injunction is overruled.

II

Sections of the Kentucky Constitution.

Sec. 196. Transportation—Charge for—Common Law Liability. Transportation of freight and passengers by railroad, steamboat or other common carrier shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability.

Sec. 213. Freight and Cars to be Handled and Transported Without Discrimination. All railroad, transfer, belt lines and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, transfer, belt lines or bridges, or doing a railway business in this State, shall receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight, in car loads or less quantities, coming to or going from any railroad, transfer, belt line, bridge, or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor, in any matter as to payment, transportation, handling or delivery; and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business.

Sec. 214. Exclusive or Preferential Contract Forbidden. No railway, transfer, belt line, or railway

bridge company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier.

Sec. 215. FREIGHT TO BE TRANSPORTED AND HANDLED FOR ALL PERSONS ON SAME TERMS. All railway, transfer, belt lines or railway bridge companies shall receive, load, unload, transport, haul, deliver and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner, and for the same charges, and for the same method of payment.